95-986

Supreme Court, U.S.
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No. _____

In the

**Supreme Court of the United States**

October Term, 1995

RALPH HALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether prior U.S. Supreme Court decisions authorizing States to require Indian or tribal retail vendors of cigarettes, on reservation, to collect state cigarettes use taxes from non-Indian purchasers can be validly utilized by State taxing authorities and U.S. Bureau of Alcohol, Tobacco and Firearms to federally criminalize tribal Indian retail vendors and their employees under the terms of the "Contraband Cigarette Trafficking Act of 1978"?

2. Whether the Court of Appeals for the Ninth Circuit has grossly misruled in misapplying the actual terms and provisions of a Washington in-state trade regulation pertaining to tribal Indians on-reservation trade in cigarettes to the federal "Contraband Cigarettes Trafficking Act" as if incorporated therein by reference to effectively require the Indian retail vendor to pay cigarette taxes as opposed to a duty only to collect from non-Indian on-reservation purchasers?

3. Whether "Indian Commerce" is an included element within the RICO statutes charged as being violated in this case?

4. Whether the Puyallup Indian reservation is de jure a State or territory of the "United States"?

5. Whether the Court of Appeals may validly decide a rule for the first time in this case upon which the trial jury was not instructed but was the actual single legal basis for finding of guilt or innocence by them, without usurping the jury function and violating due process of law as guaranteed to the Petitioner by the U.S. Constitution, Amendments 5 and 6 thereof?

6. Whether Petitioner's situation of record, as contended for as a complex one respecting the CCTA justified a requirement that the government prove specific intent to violate the CCTA or at least allow for Petitioner in his defense to try and prove lack of specific intent to violate the CCTA.

## PARTIES TO THESE PROCEEDINGS

There is a companion case to this one. It is entitled United States v. Kenneth Baker, Ninth Circuit No. 94-30125. Mr. Baker's attorney had indicated that a petition will be filed on behalf of Mr. Baker. In addition, the Ninth Circuit Court of Appeals is considering another case raising substantially the same issue. It is entitled United States v. Ted Gord, Ninth Circuit No. 94-30386. This case is on appeal by the government of the dismissal of similar charges to those faced by Baker and Hale.

# TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THESE PROCEEDINGS ..... iii

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS ..... 2

STATEMENT OF THE CASE ..... 10

REASONS FOR GRANTING THE WRIT ..... 20

CONCLUSION ..... 27

## TABLE OF AUTHORITIES

Page

CASES CITED:

US v. Cheeks, 498 U.S. 192 (1991) . . . . . 18

Ratzlaf v. US, 510 U.S. _____ 114 S. Ct. 655 (1994) . 18

Confederated Tribes of the Colville Indian Nation v. Washington, 447 U.S. 134 (1980) . . . . 11, 21, 22, 23, 24

Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976) 29

Chemehueui Indian Tribe v. California State Board of Equalization, 474 U.S. 9 (1985) . . . . . 11, 22

Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 498 U.S. _____ (1991) . 11, 22

Dept. of Taxation and Finance of New York, et al v. Milhelm Attea Bros., Inc., et al, ___ U.S. ___ (1994) 11, 24

Oklahoma Tax Comm v. Chickasaw Nation, 515 U.S. _____ (1995) . . . . . 11, 29

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) . . . . . 17, 25

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) . . . . . 23

United States v. Brigman, 874 F. Supp. 125 (e.d. Wash. 1994) . . . . . 13

U.S. Constitution, Art. 1, Sec. 8, Clause 3 ..... 2, 25

18 U.S.C. §1956(1)(A)(i) ..... 16

18 U.S.C. §1962(c)(d) ..... 16

18 U.S.C. §2341 ..... 3, 4, 12, 16, 22, 25, 26, 28

18 U.S.C. §2342 ..... 3, 4, 12, 22, 28

25 U.S.C. §261 ..... 15

25 U.S.C. §262 ..... 15

25 U.S.C. §263 ..... 15

25 U.S.C. §264 ..... 15

28 U.S.C. §1254(1) ..... 2

RCW 82.24.020 ..... 4

RCW 82.24.030 ..... 4

RCW 82.24.130(1)(a) ..... 5, 6

RCW 82.24.250 ..... 5, 7

WAC §458-20-192 ..... 8, 14, 18, 19, 22, 26

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## OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit below (App. A) is reported in _____ F. 2d _____

(9th Cir. 1995). The opinion of the District Court below (App. D) was not reported.

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## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit below (App. A) was entered on August 21, 1995. Petition for rehearing was duly made and it was denied on October 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. In fact the whole of the U.S. Constitution's "Commerce Clause" is implicated in one fashion or another in this case. It provides in Article I, §8 Cls. 1, and 3, that:

> "The Congress shall have power...[Cl. 1] to regulate commerce with foreign nations, and among the several States and <u>with the Indian</u>

tribes. [Cl. 3]." (Emphasis added.)

2. The federal statutes under which Petitioner and co-defendants were prosecuted is 18 U.S.C. §2342, as co-joined with 18 U.S.C. §2341 providing definitions of terms as pertinent to this case.

§2342 provides:

> "(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes. (b)...[not pertinent]."

§2341 provides:

> "As used in this chapter [18 U.S.C. §2341, et seq.]
> (1)...[not pertinent]
> (2) the term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable state cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes and which are in the possession of any person other than..." ...(4) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands." (Emphasis

added.)

Full text of §§2342 and 2341 are herewith set forth in (App. E)

3. Those State statutes of general applicability deemed by the U.S. Court of Appeals to provide a predicate basis for state excise taxes on cigarettes to be imposed upon tribal Indians for the purposes of the federal "Contraband Cigarette Trafficking Act", (18 U.S.C. §2341, et seq.) are in pertinent part:

RCW 82.24.020(1) which provides:

> "(1) there is levied and there shall be collected as hereafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to..."

RCW 82.24.030 provides:

> "In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps...to be affixed on the smallest...package that will be handled, sold, used, consumed or distributed..."

RCW 82.24.130(1)(a) provides:

"(1) the following are subject to seizure and forfeiture:
(a) Subject to RCW 82.24.250, any articles taxed in this chapter that are found at any point within this state, which articles are held, owned, or possessed by any person, and that do not have the stamps affixed to the packages or containers. (Emphasis added.)

[However] subsection (3) further provides:

"Notwithstanding the foregoing provisions of this section, articles taxed in this chapter which are in the possession of a wholesaler or retailer, licensed under Washington State law, for a period of time necessary to affix the stamps after receipt of the articles shall not be considered contraband.

(Note: The legislative history of RCW 82.24.130(1)(a) is in the Revised Code of Washington Annotated (RCWA) making clear that it was rewritten in 1987 and then amended in 1990 to add "under Washington State Law", deleting "by the department pursuant to Chapter 19.91 RCW".)

RCW 82.24.250 provides in pertinent part:

"No person other than (1) a licensed wholesaler in its own vehicle, or (2) a person who has given notice to the department in advance of the commencement of transportation shall transport or cause to be transported cigarettes not having the stamps

affixed to the packages or containers upon the public highways, roads or streets of this state. In the case of transportation of unstamped cigarettes such persons shall have in their actual possession invoices or delivery tickets for such cigarettes which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser and quantity and brands of the cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state, such purchaser or consignee must be a person who is authorized by Chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by Chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the name and true address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of

> the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.
>
> For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer, licensed under Washington state law, the United States or an agency thereof, and any Indian tribal organization authorized under rules adopted by the department of revenue to possess unstamped cigarettes." (Emphasis added.)

82.24.250 was amended by laws 1990 ch. 216 §6, eff. March 27, 1990. See Revised Code of Washington Annotated (RCWA) Title 82.24.250. This 1990 legislation is noted therein thusly:

> 1990 Legislation
>
> Laws 1990, ch. 216, §6, in the first paragraph, substituted the first and second sentences for a former first sentence, which had read: "Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or

> delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes so transported."; in the fourth paragraph, following "licensed" substituted "under Washington state law" for "pursuant to the provisions of chapter 19.91 RCW"; and following "tribal organization authorized" inserted "under rules adopted by the department of revenue"." (Emphasis added.)

Wash. Admin. Code (WAC) §458-20-192, as revised 1980, as pertinent provides:

> "Under the revenue laws of the state of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:
> ...CIGARETTE TAX Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make pre-collection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this

rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery or sale and delivery by any person of unstamped cigarettes to Indians or tribal vendors for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department of revenue. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the vendor. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the vendor's place of business, records indicating the percentage of such trade that has historically been realized by the vendor, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of unstamped cigarettes to any reservation or to any Indian or tribal vendor thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year by the Tobacco Tax Institute, multiplied by the resident enrolled membership of the affected tribe. Any delivery, or attempted delivery, of

> unstamped cigarettes to an Indian or tribal vendor without advance approval by the department will result in the treatment of those cigarettes as contraband and subject to seizure and in addition the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. Approval for sale or delivery to Indian or tribal vendors of unstamped cigarettes will be denied where the department finds that such Indian or tribal vendors are or have been making sales in violation of this rule.
>
> Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.
>
> Revised November 14, 1980." (Emphasis added.)

(Note: Paragraphs 1 and 2 under "Cigarette Tax" deal with tax liability of Indians. Paragraph 3 deals with tax liability of persons conducting business with Indians.)

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## STATEMENT OF THE CASE

This is an "aggravated" case of judicial misrule by which the U.S. Court of Appeals has literally "turned on its

head" a line of U.S. Supreme Court decision in the State cigarette tax field. It has done this by upholding the federal criminalization of tribal Indian transportation of unstamped cigarettes through Washington State territory to the Puyallup Tribe's reservation for retail sale to the tribal Indians of that reservation. In reaching its decision upholding the federal "Contraband Cigarette Trafficking Act"[1] prosecution of Petitioner Ralph Hale, the Court of Appeals ignored, misapprehended, or both, pertinent State of Washington, Department of Revenue regulations, and most importantly, the holdings in certain key Supreme Court decisions.[2]

These decisions with absolute certainty make it clear that no federal prosecution of Indian or tribal vendors is

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[1] 18 U.S.C. §§ 2341, 2341, et. seq.

[2] Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976); Confederated Tribes of the Colville Indian Nation v. Washington, 447 U.S. 134 (1980); Chemehuevi Indian Tribe v. California State Board of Equalization, 474 U.S. 9(1985); Oklahoma Tax Commission v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, 498 U.S. _____ (1991); Dept. of Taxation and Finance of New York, et al v. Milhelm Attea Bros., Inc., et al, _____ U.S. _____ (1994); Oklahoma Tax Comm. v. Chickasaw Nation, 515 U.S. _____ (1995).

legally possible under the terms of the CCTA - 18 U.S.C. §§2341, 2342, as no possible payment of state taxes on cigarettes or otherwise can be required of a tribal Indian vendor on reservation. Furthermore, it has been solidly Supreme Court confirmed that tribal Indian vendors' cigarettes in transit to their reservation, are as yet tax exempt.

The Petitioner, Ralph Hale, was an employee of Jody Satiacum, an enrolled member of the Puyallup Indian Tribe. Jody Satiacum is the owner of a smokeshop known as the "Indian Trading Post", which is located on the Puyallup Indian Reservation. Petitioner managed the Indian Trading Post for Jody Satiacum.

The Indian smokeshop purchased cigarettes without the Washington state tax stamp from the "Busted Ass Ranch", a Flathead Indian reservation wholesaler, located in the State of Montana. The cigarettes were either delivered to employees of the Indian Trading Post in Montana, or in the state of Idaho. The cigarettes were in turn transported by the

employees to the Indian Trading Post for retail sales to Puyallup Tribal members.

On October 22, 1992 a grand jury returned an indictment charging 23 alleged co-conspirators, among them the Petitioner, with forming an enterprise for the purpose of smuggling contraband cigarettes from the state of Montana to the state of Washington, and with committing the substantive offenses of trafficking in contraband cigarettes and laundering the proceeds of contraband cigarette sales. All of the Indian retailers indicted, except for Petitioner herein and one Kenneth Baker, transferred venue of their trials to the state of Washington. In all cases, the Indian retail vendors that transferred venue to the state of Washington were either found not guilty or their cases were dismissed upon motions for summary judgment. See United States v. Brigman, 874 F. Supp. 125 (e.d. Wash. 1994). Petitioner and Kenneth Baker were the only defendants who were found guilty at a jury trial presided over by Charles C.

Lovell, District Judge, U.S. District Court, District of Montana.

On appeal to the 9th Circuit U.S. Court of Appeals, the Court of Appeals upheld the convictions.

Based upon Washington Administrative Code (WAC) regulation 458.20.192, set forth Supra, the U.S. Court of Appeals most mistakenly decided that it should be interpreted to require the Indian tribal vendor of cigarettes to Tribal members on reservation to obtain advance approval ("pre-approval") before bringing unstamped cigarettes into and through the territory of the State of Washington, or otherwise buy and therefore pay state cigarette use taxes on the cigarettes so transported. This regulation however, by its very clear terms, is applicable only to the non-Indian wholesalers in State who are delivering cigarettes as purchased from them by Indian or tribal vendors to the same on their reservations. In other words, this regulation clearly does not act upon the Indian or Tribal vendor at all, even

though it clearly would indirectly affect his cigarette supply, inventory potential in Washington state.

It should be further noted that although Petitioner's employer was at all times in this case an Indian, on-reservation cigarettes vendor, and therefore could be loosely referred to as an "Indian Trader", that term is legally employed to mean a non-Indian trading with Indians on their reservation, that he is clearly not in the context of this case. Accordingly, Petitioner as an employee strictly for Jody Satiacum, could not be construed as an "Indian Trader" as that term is defined. Furthermore, the said Court of Appeals ruling was clearly not decided on

that premise either.[3]

Another obvious situation of national importance in the important area of federal Indian law and affairs is the glaring omissions of the Court of Appeals to decide that issue

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[3] 25 U.S.C. §§ 261, 262, 263, 264

of whether those "RICO" statutes[4] under which Petitioner/Defendant was charged and convicted, were legally maintainable by the government. Those "RICO" statutes expressly purport to prohibit specified conduct that affects interstate or foreign commerce only, therefore, not the other species of commerce constitutionally regulated by Congress known as "Indian Commerce". Clearly Petitioner's conduct of record in its entirety implicated "Indian Commerce" alone. Thus making "RICO" wholly inapplicable to him. That in any event the "RICO" charges in general are and were wholly dependent upon valid CCTA offenses in the first instance. That this issue was briefed for the Court of Appeals is a matter of record.

Additionally, the Court of Appeals ignored the legal reality that the Congress, in adopting the CCTA, defined the term "State"[5] in a way which excludes Indian reservations

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[4] 18 U.S.C. §§1962(d), 1962(c); 18 U.S.C. §1956(1)(A)(i)

[5] 18 U.S.C. §2341(4)

and military reservations quite clearly. Thus making the CCTA itself wholly inapplicable to federally recognized tribal Indian trade on reservation in cigarettes. This very point was before the Court of Appeals by written brief of Petitioner/Defendant therein explaining legal precedent[6] which clearly establishes that an Indian reservation is not a state and a tribal entity or nation is not to be treated as a state in any way.

Furthermore, Petitioner was clearly denied his demand on the trial court level (U.S. District Court, District of Montana at Helena/Missoula) to introduce testimony as to his understanding of the Federal Indian laws, State laws as bearing on his lack of specific intent to knowingly violate the CCTA, and related laws. The U.S. Court of Appeals upheld the trial court's determination. Thus Petitioner was deprived of his defense being presented to the jury. Obviously the entire circumstances involving the application of the CCTA

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[6] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)

to tribal Indian retail trade in cigarettes with the delivery to the Puyallup tribal Indian vendor/proprietor himself, although through is direct employees taking place as it always did outside Washington State per court record of this case is one of extreme complexities. The rule announced by the Supreme Court of the U.S.A. in U.S. v. Cheeks, 498 U.S. 192 (1991); and Ratzlaf v. U.S., 510 U.S. _____ 114 S. Ct. 655 (1994), should be controlling to correct misrule of the Court of Appeals. The Court of Appeals in effect finding that it should be simple enough for Petitioner, an employee for many years in the Indian cigarettes retail business, to know that his employer, a Puyallup Indian, had to obtain a most illogical type of advance approval by the State wherein the delivery to him was made, but by an out-of-state Indian wholesaler itself, to him or his employee, and at an out-of-Washington-state location. Obviously, the questioned WAC regulation 458-20-192, by a simple fair reading, cannot be construed the way the Court of Appeals has done so herein.

This is a case of the first impression taking all concerned by surprised to the actual law which should be controlling. In fact, this situation factually is so complex legally that the two federal district courts for the Washington state area (both Eastern and Western districts) have ruled in accordance with what had become the custom established over the years since the "Colville" case was decided in 1980. These U.S. District courts are clearly closer to understanding related Washington State law and regulation than the other U.S. District Court for Montana, which had ruled to the contrary previously. Said U.S. District Courts' written decisions are of course appended hereto.

Moreover, the U.S. District Court at Helena, Montana at no time ruled or instructed the jury that a pre-approval requirement applicable to the actual Indian vendor or his employees under the terms of WAC 458-20-192 would be necessary for them to return the verdict they gave. This raises a serious issue of denial of due process of law and

right to trial by jury under the 5th and 6th Amendments of the U.S. Constitution. This is so because the question of pre-approval, mistakenly found by the U.S. Court of Appeals in said regulation, was so "found" for the first time, before said Court of Appeals.

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## REASONS FOR GRANTING WRIT

### I.

For tribal Indian on Indian reservation trade in cigarettes the U.S. Supreme Court alone by its decisions[7] "opened up" the Indian reservations to very limited State regulations. When It did so, it was very careful to require that State regulation would never intrude upon "Core tribal interests". Further, it confirmed that Indian or tribal vendors on-reservation would never have to pay state cigarette taxes. That is clearly the condition of U.S. law today. Yet under

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[7] For list of pertinent U.S. Supreme Court decisions, see footnote "2", Supra.

the ruling by the U.S. Court of Appeals in this case involving Petitioner, it has been clearly misruled that state regulation may be construed to require an Indian or tribal vendor to obtain approval for transportation of unstamped cigarettes through Washington state territory to the reservation or pay the state cigarette taxes imposed thereon. Even though these very same unstamped cigarettes are for retail sale to tribal members as they desire it and are clearly tax exempt for any purpose while in transit to the reservation for sale to tribal members and non-Indians alike.

Succinctly stated, this high Court in Colville, Supra at p. 162, footnote 2, held:

> "...Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the tribes as here, have refused to fulfill collection and remittance obligations which the State has validly imposed."

Furthermore, the "Colville" case, Supra at p. 142, makes clear that:

> "...[T]he legal incidence of the tax is on the purchaser in transactions between an Indian seller and a non-Indian buyer."

Accordingly, no valid State of Washington statutes or regulations under "Colville", "Chemeheuni" or "Pattawatomi", Supra, footnote 2 herein, could legally exist where the result would be to require Puyallup Indian or tribal vendors to pay state cigarettes taxes or assessments.

Accordingly, upon this issue alone (an important question of federal related law), the Court of Appeals decision in this case is in serious conflict with said relevant decisions of the high Court itself beyond doubt. The federal "Contraband Cigarette Trafficking Act", 18 U.S.C. §§2341, 2342, (set out Supra in pertinent statutes section), operates only to enforce state laws which validly require persons to actually pay state cigarette taxes. Obviously, the Indian or tribal vendor and his employees are not required to do this.

II.

The Court of Appeals in construing WAC 458-20-192

to require the Indian vendor to obtain state advance approval prior to delivery to himself, (a non-sequitur engaged in by the Court) or otherwise pay the state cigarette tax prior to or while his shipments are in transit to his reservation for sale, in this case specifically narrowed to tribal members, is a result which is forbidden, as it directly and positively imposes actual payment of a state cigarette tax on the Indian vendor who is otherwise constitutionally immune from State taxation. In "Colville", Supra, footnote 2, at p. 11, the high Court said:

> "But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under McClanahan v. Arizona State Tax Commission, 411 U.S. 164...(1973), the first taxable event is the use, consumption, or possession by the non-Indian purchaser."

Obviously, packages of cigarettes without State tax stamps thereon in the possession of tribal Indians (on or off reservation) could hardly be construed as "contraband" or any

kind under either State or Federal laws.[8] In fact, the case of Dept. of Taxation and Finance of New York, et al. v. Milhelm Attea & Bros., Inc et al., _____ U.S. _____, 111 S. Ct. 146 (1994) holds:

> "Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, see Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 475-481 (1976), cigarettes to be consumed on the reservation by enrolled tribal members are tax-exempt and need not be stamped." (Emphasis added.)

III.

Those "racketeering" statutes (RICO) Petitioner was charged with violating do not encompass within their terms "Indian Commerce". Said statutes - see footnote 4 supra, expressly are predicate upon activities so prohibited which affect interstate or foreign commerce. This case clearly involves that other species of commerce expressly set forth

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[8] Even though some unstamped cigarettes (for non-Indian consumption) may be seizable while in transit to the reservation, it is only for a collection indebtedness, not for a tax indebtedness. The Indian is a tax collector only!

in the U.S. Constitution, Article I, Section 8, Clause 3, as "commerce with the Indian tribes." In Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 190-193 (1989) the Court held that the Interstate commerce clause does not apply to Indian tribes, stating:

> "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes - foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct. In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States." (Emphasis added)

IV.

As a matter of law, "tribal reservations are not states." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 191, 192, 193 (1989). Accordingly, the terms sections of the CCTA (18 U.S.C. §2341(4)), by its express language wholly excludes applicability to the Puyallup Indian Tribal reservation and the cigarettes trade in unstamped cigarettes thereon and relating thereto. In effect, the Court of Appeals

by its decision is re-writing 18 U.S.C. §2341(4) to include Indian reservations as states which the high Court makes clear in fact and law are not states.

V.

The Court of Appeals in misconstruing the terms of WAC 458-20-192, for the first time in the case required State pre-approval for the Indian vendor to bring his cigarettes to his reservation smokeshop or otherwise be the subject of direct state taxation for the purpose of the CCTA. In so doing, it has effectively destroyed Petitioner's right to trial by jury and due process of law in the context of this case especially. Before the trial court and jury wherein the law and facts were tried, neither Judge, jury nor Petitioner/Defendant were ever apprised that failure to secure pre-approval from the state for unstamped cigarettes destined for retail sales to tribal members implicated the CCTA. Particularly where such approval was not received and state taxes were not paradoxically thereafter paid to secure their

existent immunity from state taxation as guaranteed by U.S. High Court decisions.

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## CONCLUSION

The Court of Appeals ruling at issue, upholding as it does actual imprisonment of Petitioner, disturbing judicial mischief "turning on its head" as it does law in several key areas of federal Indian affairs. This decision ignores the CCTA requirement that it operate to criminalize only where "payment of applicable state cigarettes taxes is required." Clearly, the Supreme Court has ruled that the tribal Indian vendor on reservation has but a duty to collect taxes from non-tribal members, but not a duty under any circumstances whatsoever to pay cigarette taxes or any other State taxes on reservation! The very key operative regulation of the State of Washington incorrectly and even clumsily incorporated by reference into the said operative terms of the CCTA, itself, by its very terms operates only upon the non-Indian

(otherwise fully state regulated) wholesalers who are subject to the jurisdiction of the State of Washington, i.e. "in-state" wholesalers, therefore precluding any pertinency at all to the transportation of unstamped cigarettes issues involved. Thus is the entire case against Petitioner involving thousands of counts wholly without foundation for want of a single possible CCTA violation.

Moreover, as a CCTA violation cannot possibly occur legally per terms of 18 U.S.C. §§2341 and 2342, for collateral valid State regulation of Indian cigarettes trade such as a duty to collect, remit, account and Indian purchases from the State tax stamps to be affixed prior to sale to non-Indians only, so too also a pre-approval requirement, assuming arguendo such existed, should not likewise implicate the CCTA provision in any way either.

A tribal reservation is not a State under the CCTA in any event.

Indian Commerce activities do not implicate interstate

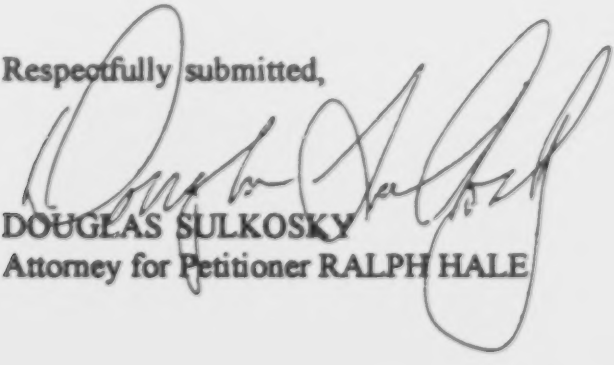
or foreign commerce or in any way affect these.

Pre-approval, the failure to secure the same, or pay cigarettes use taxes by an Indian vendor is strictly an intrusion upon Indian immunity from state taxation on-reservation.

Perhaps the U.S Supreme Court should not have opened this "Pandora's box" in making the Indian on-reservation vendor a tax collector in Moe, Supra, footnote 2. Giving the State of Washington "an inch, they took a mile."

Even in the latest Supreme Court case, Chickasaw, Supra, footnote 2, it was again confirmed that with respect to State taxation regulation, the Indian tribal vendor is but a tax collector, not ever to be a tax payer.

Respectfully submitted,



DOUGLAS SULKOSKY
Attorney for Petitioner RALPH HALE

# APPENDIX

## APPENDIX A

THOMPSON, Circuit Judge:

Appellants Kenneth M. Baker and Ralph Hale (defendants) were convicted in federal district court of one count each of conspiring to traffic in contraband cigarettes, in violation of 18 U.S.C. § 2342 and 18 U.S.C. § 371; two counts each of trafficking in contraband cigarettes, in violation of 18 U.S.C.§ 2342(a); one count each of conspiring to commit racketeering activity, in violation of 18 U.S.C. § 1962(d); one count each of committing racketeering activity, in violation of 18 U.S.C. § 1962(c); and 671 and 218 counts, respectively, of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i).

The defendants appeal their convictions and sentences. They contend that: (1) the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2341 et seq., is not applicable to Indian traders; (2) even if the CCTA is applicable, the Act does not prohibit the activities for which they were

prosecuted; (3) Washington's cigarette tax scheme-on which their CCTA violation was predicted-is invalid as applied to Indians because it (a) impermissible intrudes upon rights of Indian sovereignty, (b) is preempted by the Indian Trader Statutes; and (c) violates the Equal Protection Clause; (4) the government failed to prove the mens rea element required for conviction of violating the CCTA, conspiring to traffic in contraband cigarettes, and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d); (5) they were impermissibly prosecuted for multiplicitious conspiracy counts; (6) there was insufficient evidence to convict them of the charged crimes; (7) the tolling provision of the Speedy Trial Act, 18 U.S.C. § 316(h), which the district court applied in this case, violates the Sixth Amendment speedy trial guarantee; (8) the district court improperly informed the jury of the potential for appeal; (9) the district court improperly denied their requests for a "good faith" instruction and related request for subpoenas; (10) the

district court improperly refused to give proposed jury instructions; (11) the district court wrongfully denied Hale's motion for arrest of judgment and a new trial; and (12) the government engaged in sentencing manipulation.

The government cross-appeals, challenging the defendants' sentences. It argues the district court erred in calculating the defendants' base offense levels under the Sentencing Guide lines.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the defendants' convictions and sentences in their entirety.

## FACTUAL BACKGROUND

On October, 22, 1992, a grand jury returned a 2,826-count indictment charging 23 alleged conspirators, among them the defendants Baker and Hale, with forming an enterprise for the purpose of smuggling contraband cigarettes from the State of Montana to the State of Washington, and with committing the substantive offenses of trafficking in

contraband cigarettes and laundering the proceeds of contraband cigarette sales.

The indictment was based on the following facts; Stan Feist is the owner of Feist and Watson Enterprises, Inc. d/b/a Sheehan-Majestic, a Montana corporation engaged in the wholesale distribution of cigarettes, candy and specialty foods. Dorothy Clinkenbeard is an enrolled member of the Confederated Salish and Kootenai Indian Tribes, and she holds a wholesaler's license issued by that tribe. Together with her husband Larry Clinkenbeard, Dorothy co-owns the Busted Ass Ranch in Arlee, Montana. Dorothy co-owns various other businesses located on the Flathead Indian Reservation in Montana, one of which is Joe's Smoke Ring- a gas station, casino and convenience store.

The State of Montana permits wholesalers to sell tax exempt, unstamped cigarettes in unlimited quantities to Indians living on Indian reservations located within the state. In the early 1980's, Feist entered into an agreement with the

Clinkenbeards to be their supplier of unstamped cigarettes.

Pursuant to the arrangement between Feist and the Clinkenbeards, Sheehan Majestic, beginning in mid-1982 and continuing until November 24, 1991, sold unstamped cigarettes to Joe's Smoke Ring in Montana. The unstamped cigarettes to Joe;s Smoke Ring to the Busted Ass Ranch in Montana. From the Busted Ass Ranch, the cigarettes were transported by employees of the Clinkenbeards to various prearranged locations in Idaho. There, representatives of various retail smokeshops, all located on Indian reservations in Washington, took possession of the cigarettes and transported them to their Washington destinations.

Washington law provides that all cigarette packages possessed in that state must bear applicable stamps as proof of tax payment. Wash. Rev. Code § 82.24.030. Although Indians are permitted to buy unstamped cigarettes to Indian reservations in Washington must be preapproved by the state's Department of Revenue. Wash. Admin. Code §

458.20.192. Unapproved cigarettes are considered contraband. Wash. Admin. Code § 458.20.192. None of the parties involved in the transactions relevant to this case obtained preapproval for bringing any unstamped cigarettes into the State of Washington.

Defendant Baker is an enrolled member of the Shoalwater Indian Tribe. He manages a retail smokeshop. The Shoppe, on the Puyallup Indian Reservation near Tacoma, Washington. Defendant Hale manages a smokeshop known as the Indian Trading Post, which is also located on the Puyallup reservation. Although Hale is not a Native-American, the owner of the Indian Trading Post, Jody Satiacum, is an enrolled member of the Puyallup Tribe and her business is licensed by that tribe.[1]

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[1] At oral argument, there was some disagreement as to whether Hale's non-Indian ethnicity is relevant to this appeal in light of the fact that Satiacum, the owner of the smokeshop Hale managed, is an enrolled Indian tribal member. Because we hold Indians are not exempt from the CCTA and Washington's cigarette tax scheme is valid as applied to Indians, Hale's and Satiacum's ethnicities are irrelevant to Hale's appeal.

Baker and Hale were indicted along with Feist, the Clinkenbeards and the other alleged coconspirators, The indictment charged various counts of trafficking in contraband cigarettes, RICO violations, conspiracy to violate RICO, conspiracy to traffic in contraband cigarettes, and money laundering. Some of the coconspirators were granted changes of venue and their cases were severed.[2] Feist and Clinkenbeards pleaded guilty to one count of conspiracy to violate RICO.[3] Charges against other coconspirators were dismissed pursuant to the plea agreements. Baker and Hale went to trial and were convicted on all counts. This appeal followed.

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[2] Charges against some of the severed coconspirators were subsequently dismissed. United States v. Brigman, 874 F. Supp. 1125 (E.D. Wash. 1994). Trial of one coconspirator is still pending.

[3] The plea agreements provide that, if any other codefendant is successful in overturning on appeal the district court's determinations that (1) the CCTA applies to Indians and (2) conviction under the CCTA does not require proof of specific intent to violate the law, Feist and the Clinkenbeards can withdraw their guilty pleas and continue to contest the charges against them. for this reason, Feist and the Clinkenbeards ave filed amici briefs in this case and were permitted to participate in oral argument.

## DISCUSSION

1. Applicability of the CCTA to Indian Tribal Members

The defendants first contend that the CCTA does not apply to Indians. Because all charges against the defendants depend on a predicate violation of the CCTA, their convictions must be reversed on all counts if in fact Indians are exempt from the provisions of the Act.

Whether a federal statute applies to Indians is a questions of law which we review de novo. Confederated Tribes of Warm Springs Reservation v. Kurtz, 691 F.2d 878, 880 (9th Cir. 1982). cert. denied, 460 U.S. 1040 (1983).

[1] The CCTA makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 234. For purposes of the Act, contraband cigarettes, which bear no evidence of payment of applicable State cigarette taxes in the State where such cigarettes are found." 18 U.S.C. § 234(2).

The Act excludes from this definition cigarettes which are the possession of certain specifically identified categories of individuals.[4] Indians are not among the specifically exempted categories. Nonetheless, the defendants argue Congress did not intend the provisions of the Act to apply to Indians.[5] We reject this argument.

Federal laws of general applicability are presumed to apply with equal force to Indians. United States v. Farris, 624 F.2d 890, 893, (9th Cir. 1980), cert. denied sub nom, Baker v. United States, 449 U.S. 1111 (1981). See also

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[4] The exempted categories include (1) manufacturers and exporters of tobacco products; (2) common or contract carriers transporting the cigarettes under a proper bill of lading; (3) persons authorized by the state in which the cigarettes are found to account for and pay cigarettes taxes, and who have complied with all accounting and payment requirements; and (4) government agents or instrumentalities having possession of the cigarettes in connection with the performance of official duties. 28 U.S.C. § 2342(2)(A)-(D).

[5] The defendants also argue the CCTA does not apply to Indians because, in Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 111 S. Ct. 905, 912 (1191), the Supreme Court listed the options available to states wishing to collect cigarette taxes from transactions conducted on Indian reservations. Although the CCTA was in effect at the time, the Court did not include prosecution under this Act as one of the options. We are not persuaded by this argument. Nothing in Potawatomi indicates the Supreme Court intended its list of options to be exhaustive.

United States Dep't of Labor v. OSHRC, 935 F.2d 182, 184, (9th Cir. 1991)(quoting FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). There are only three exceptions to this general principle:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters,"(2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties," or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d at 893).

The defendants do not contend the CCTA touches exclusive rights of tribal self-governance. They argue, however, that the treaty rights exception applies to the CCTA. They point out that the only restriction on the Puyallup Tribe's trading activities imposed by the Medicine

Creek Treaty of 1854 appears in Article 12 of the Treaty, which provides: "The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States." Medicine Creek Treaty, 10 Stat. 1132 (1854). The defendants argue the parties to the Treaty intended no other restrictions on Indian trade.

[2] Even assuming the defendants are correct about the expectations of the signers of the Medicine Creek Treaty,[6] the CCTA is not an impermissible restriction on a trading right guaranteed by the Treaty. In Dillon v. United States, 792 F.2d 849, 853 (9th Cir. 1986), cert. denied sub nom. Cross v. United States, 480 U.S. 930 (1987), we held that imposition of a federal income tax on Indian smokeshop income did not violate Article 12 of the Medicine Creek Treaty. We reasoned the tax was "not a burden on a treaty-

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[6] This assumption is not necessarily correct. In Washington v. Confederated Tribes of the Colville Indian Nation, 447 U.S. 134 (1980), the Supreme Court found that similar treaties with other tribes did not prevent the states form imposing limited burdens on Indians for purposes of collecting lawful taxes from non-Indians. Id. at 156.

protected right, but upon the income earned through the exercise of that right." Id. Similarly, the CCTA does not restrict trading in cigarettes; it makes it a crime to fail to pay applicable state taxes on cigarettes subject to tax.

The defendants and amici curiae argue at length that the legislative history of the CCTA evinces Congress' intent to exempt Indians from the scope of the Act. In support of this contention, they argue language in both the Senate and House Conference Reports indicates that the CCTA was intended to assist the states in curbing the large-scale smuggling of contraband cigarettes by organized crime groups, not the untaxed cigarette trafficking conducted by Indian traders.

[3] The legislative history of the CCTA does indicate Congress was primarily concerned with large-scale cigarette boot-legging and the involvement of organized crime. See S. Rep. No. 962, 95th Cong. 2d Sess. 1, 9, reprinted in 1978 U.S. Code and Cong. Admin. News 5518, 5523 ("The

interstate aspect of the problem lends itself to a joint Federal-State interdiction effort which is focused upon the major violators and the organized crime groups.") Congress chose to deal with this concern by defining "contraband cigarettes" as "a quantity in excess of 60,000." See S. Rep. No 962 at 16 (explaining the rationale for the 60,000 figure). It could have, but did not, specifically exempt Indians from the provisions of the Act. See also United States v. Roselli, 432 F.2d 879, 885-86 (9th Cir. 1970) (finding that, although by enacting 18 U.S.C. § 1952 Congress primarily intended to strike at organized crime, it did not restrict the statute's prohibitions to members of organized crime groups; rather, it stated the limitation in general terms applicable to organized crime, but not confined to it).

The defendants and amici curiae place great emphasis on the following footnote in House Conference Report No. 95-1778:

Some concern was expressed in the course of

> the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of State taxation. The phrase "applicable State cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights.
>
> The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe.

H.R. Conf. Rep. No. 1778, 95th Cong., 2d Sess. 1, 9 n.1, reprinted in 1978 U.S. Code and Cong. Admin. News 5535, 5538.

We do not interpret this footnote as evidence of congressional intent to create an additional category of persons exempt from the CCTA, But see United States v. Brigman, 874 F. Supp. 1125, 1131, (E.D. Wash. 1994) (relying on this footnote in dismissing the charges against

some of the severed coconspirators). A fair reading of the footnote indicates Congress merely intended not to preempt rights granted to Indians by the states to transport and distribute untaxed cigarettes.[7] It accomplished this goal by using the phrase "applicable State cigarette taxes" in the statute. Thus, to the extent the states exempt Indians from having to pay cigarette taxes, so does the CCTA.

2. Defendants' Violation of the CCTA

The defendants next argue that, even if the CCTA is applicable to Indians, the Act does not criminalize the activities for which they were prosecuted.

[4] As stated above, the CCTA prohibits shipping,

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[7] The Clinkenbeards argue that, even if the footnote is not construed to completely exempt Indians from the strictures of the CCTA, it still exempts them from prosecution for activities that were legal in 1978, when the CCTA was enacted. In 1978, they contend, "the combined effect of statutory and case law in Montana, Idaho, and Washington legalized the activities" for which they were prosecuted. We are not persuaded by this argument. Nothing in the language of the CCTA or its legislative history indicates Congress intended the statute to be frozen in time. To the contrary, Congress' concern with helping the states control cigarette smuggling, and its use of the phrase "applicable State cigarette taxes", reflects an intention that the acts prohibited by the CCTA change as a function of evolving state law.

transporting, receiving, possessing, selling, distributing or purchasing contraband cigarettes. The Act defines contraband cigarettes as a quantity in excess of 60,000 cigarettes which do not bear evidence of payment of applicable state taxes in the state in which they are found. 18 U.S.C. §§ 2341-2342. Therefore, a violation of the CCTA requires, as a predicate, the failure to comply with state tax laws.

The State of Washington imposes an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. Wash. Rev. Code § 82.24.020 (1995). Washington collects this tax through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state which have not been preapproved for tax exemption. Wash. Rev. Code § 82.24.030. Packages of cigarettes not bearing tax stamps and not preapproved are contraband under Washington law. Wash. Rev. Code § 82.24.130(1)(a).

[5] Indian tribal members are permitted to buy tax-free, unstamped cigarettes on Indian reservations located within the State of Washington, Wash. Admin. Code § 458-20-192 (1980). However, to ensure only Indians take advantage of this tax exemption, Washington limits the quantity of unstamped cigarettes that may be delivered to the reservations. Wash. Admin. Code § 458-20-192. This quantity is determined by the "probable demand of qualified purchasers." Wash. Admin. Code § 458-20-192. Probable demand, in turn, is calculated in either of two ways. Vendors may submit statistical evidence concerning tribal demand for cigarettes. Wash. Admin. Code § 458-20-192. Alternatively, in the absence of such evidence, the Department of Revenue fixes the untaxed cigarette quota for a tribe by multiplying the tribal population by the national average cigarette consumption per capita. Wash. Admin. Code § 458-20-192.

[6] Any unstamped cigarettes brought into

Washington for purposes of sale to Indians must be preapproved by the state's Department of Revenue, which ensures the cigarettes are within the reservations's allotment.[8] Wash. Admin. Code § 458-20-192. Unapproved, unstamped cigarettes destined for sale to reservation Indians are contraband. Wash. Admin. Code § 458-20-192.

[7] The defendants do not dispute they transported into Washington unstamped cigarettes which were not preapproved by the State's Department of Revenue. Therefore, their activities violated Washington law.[9] Because the quantity of cigarettes transported by the defendants

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[8] There was some dispute at oral argument over the effective date of Washington's preapproval requirement. The requirement came into effect in 1980, before the defendants engaged in the activities at issue in this case. See Wash. Admin. Code § 458-20-192 (1980).

[9] We disagree with United States v. Brigman, 874 F. Supp. at 1128-1131, which concluded that the severed codefendants, who engaged in the same activities as the defendants in this case, did not violate Washington law. Brigman is correct that under Washington law, "tribal Indians are entitled to have unstamped cigarettes in their possession for consumption by and resale to reservation Indians." Id. at 1130. The defendants and the severed codefendants violated the law, however, by not obtaining pre-approval for their unstamped cigarettes. Brigman fails to consider the pre-approval requirement.

exceeded 60,000, their activities also violated the CCTA.

The defendant's arguments to the contrary are without merit. Baker contends that because Indians are permitted to possess unstamped cigarettes and to distribute them to other Indians. Washington law is violated only upon sale of the unstamped cigarettes to a nontribal member. Because there is no proof he engaged in a single transaction with a nontribal member which involved a quantity of cigarettes in excess of 60,000, he contends the CCTA is not implicated. Similarly, Hale contends the indictment does not charge the cigarettes he transported exceeded the quota allotted to the Puyallup Tribe.

In making these arguments, the defendant's misapprehend Washington law. Under Washington law, mere possession of unstamped cigarettes, even by an Indian, is prohibited if the cigarettes are contraband whether or not the tribe's annual allotment of unstamped cigarettes has been exhausted. The whole purpose of the preapproval

requirement is to monitor the amount of unstamped cigarettes brought into the reservation to ensure that amount does not exceed the tribe's annual quota.

The defendants also argue House Bill 1359, which was recently passed by the Washington legislature, supports their contention that at the time their alleged CCTA violation occurred. Washington law did not prohibit the activities for which they were prosecuted.

House Bill 1359 is an amendment to Washington Revised Code §§ 82.24, et seq. As amended, the statute clearly provides that Indians selling cigarettes to other Indians on reservation land are exempt from the tax, but are still required to obtain preapproval for any unstamped cigarettes and to pre-collect the tax from any non-Indian consumers. The defendants argue the amendment indicates that prior to its effective date, July 1, 1995, no Washington law regulated tribal Indians' on-reservation possession, sale, and distribution of unstamped, unapproved cigarettes. We

disagree.

"[A]n amendment to a statute does not necessarily indicate that the unamended statute meant the opposite." Hawkins v. United States, 30 F.3d 1077, 1082 (9th Cir. 1994), cert. denied, 115 S. Ct. 2576 (1995). A state legislature "may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases." id. In this case the Washington legislature was motivated by all these objectives when it passed the Bill. The Report accompanying the Bill explains that, in 1991, a federal district court dismissed an indictment charging four Indian retailers with violating the CCTA by possessing unstamped cigarettes in the State of Washington without obtaining advance approval from the Department of Revenue. The Report goes on to explain the court's decision was based on its belief that "Washington law does not prohibit an Indian retailer from acquiring cigarettes from an out-of-state source and holding them without stamps, and without

Department of Revenue approval, until sold to non-Indians." The Report then clarifies that, under Washington law. "[a] person may import unstamped cigarettes into th[e] state only after notifying the Department of Revenue in advance."

Finally, the defendants contend that even if Washington's preapproval requirement was technically on the books at the time of their alleged CCTA violation, the Supreme Court of Washington effectively wrote that requirement out of the law in Gord v. Department of Revenue, 749 P.2d 678 (Wash. 1987)-a civil forfeiture case to which Defendant Baker was a party. They point to language in Gord stating that "Baker would be exempted from affixing stamps to cigarettes... if the record revealed that the cigarettes he possessed were for sales to 'established governing bodies' of an Indian tribe."[10] Id. at 683. Based

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[10] We note that the record in this case, like the record in Gord, does not indicate the defendants' unstamped cigarettes were intended or sale to "established governing bodies of an Indian tribe," or even to individual members of a tribe. In fact, the jury heard evidence that unstamped cigarettes were sold at both The Shoppe and the Indian Trading Post to

on this language, the defendants argue the Washington Supreme Court construed the law at issue as not including a preapproval requirement, and they submit we are required to abide by that court's interpretation of the law."[11]

Contrary to the defendant's contention, the Washington Supreme Court did not hold in Gord that Washington law permits Indians to possess unstamped, unapproved cigarettes if those cigarettes are intended for sale to other Indians on reservation lands. Rather, the court explicitly recognized that Washington Administrative Code § 458-20-192 "require[d] Indian vendors . . . to seek the advance approval of the Department of Revenue before importing unstamped cigarettes into the State. Id.

In Gord, as is true here of both defendants, Baker

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any customer who walked in the door, without regard to the customer's race.

[11] The court in Brigman relied on Gord in dismissing the charges against the severed codefendants. See United States v. Brigman, 874 F. Supp. at 1130.

failed to comply with this preapproval requirement. Id. It was this omission on Baker's part, not merely the absence of evidence in the record establishing that the unstamped cigarettes were sold exclusively to other Indians, which in Gord made Baker subject to forfeiture of his pickup, trailer, and the unstamped cigarettes found within those vehicles. Id. The defendants' contention that Gord wrote the preapproval requirement out of Washington law is simply incorrect.

We conclude, based on a fair reading of the statutes and their interpretation by the Washington courts, that at the time the defendants were involved in trafficking in unstamped, unapproved cigarettes as charged in this case, the cigarettes were contraband under Washington law. Accordingly, the defendant's conduct violated the CCTA.[12]

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[12] The amici curiae Feist and Clinkenbeards discuss at length the fact that they complied with all Montana reporting requirements, and that they never entered the State of Washington. This is irrelevant. As the district court held, for purposes of the CCTA, unstamped cigarettes which are illegal in Washington but legal in Montana cannot be considered contraband until the are brought into Washington. Feist and the Clinkenbeards trafficked in the cigarettes only in Montana, where the cigarettes were not contraband. Therefore, neither Feist nor the

3. Validity of Washington's Cigarette Tax Scheme as Applied to Indians.

The defendants next argue that even if Washington law prohibits the activities in which they engaged, the law is invalid as applied to Indians because it (a) intrudes upon rights of Indian sovereignty; (b) is preempted by federal law; and (c) violates the Equal Protection Clause of the United States Constitution. We address each of these contentions in turn.

a. Intrusion on Indian Sovereignty.

[8] It is undisputed that the states cannot tax cigarettes bought on Indian reservations by tribal members without impermissibly intruding upon rights of Indian sovereignty. But the right to impose and enforce a tax on cigarettes sold by Indians to nontribal members is also clearly established. Washington v. Confederated Tribes of

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clinkenbeards could have committed the substantive crime of trafficking in contraband cigarettes, and the district court properly dismissed that charge against them. This does not mean, however, that they cannot be guilty of the crime to which they pleaded-conspiracy to violate RICO.

the Colville Indian Reservation (Colville), 447 U.S. 134 (1980); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976). Moreover, "the State may impose at least 'minimal' burdens on [Indians] to aid in enforcing and collecting the tax" from non-Indians. Colville, 447 U.S. at 151. The defendants argue Washington's cigarette tax scheme unduly burdens Indian sovereignty because it requires tax stamps to be affixed to all cigarette packages, whether destined for sale to Indians or non-Indians, if those cigarettes are not preapproved. We disagree.

In Colville, the Supreme Court approved Washington's previous cigarette tax scheme as a permissible, minor burden on Indians. At the time Colville was decided. Washington law required that cigarettes held for sale on Indian reservations bear proof of tax payment in the form of stamps only if destined for sale to non-Indians. Colville, 447 U.S. at 141-42. The Court held that, as long as the legal incidence of the tax fell upon nontribal members, the state

could require tribal smokeshops operators to keep detailed records of both taxable and nontaxable transactions. Id. at 159-60. And, finally, if the tribes failed to fulfill their tax collections and remittance obligations, the state could seize as contraband unstamped cigarettes en route to Indian reservations from out-of-state wholesalers. Id at 161-62.

The defendants contend Washington's current tax law is more burdensome than the scheme approved in the Colville case. On the contrary, the current scheme is less burdensome to Indians than it was when Colville was decided. As the district court found:

> Washington's entire regulatory program and its administration is now accomplished off-reservation. When selling cigarettes to a reservation retailer that are intended for nontribal members, a licensed distributor pays the state tax directly to the state. When selling cigarettes to a reservation retailer that are intended for tribal members, a licensed distributor obtains approval from the state to deliver unstamped cigarettes to the reservation.

There are no longer any record-keeping requirements imposed upon Indian retailer, not are the retailers required to buy stamps from the state and personally affix them to packages of cigarettes bound for sale to nontribal members.[13] If Washington's tax scheme did not unduly interfere with Indian sovereignty when Colville was decided, it certainly does not do so now.

b. Federal Law Preemption

[9] In the alternative, the defendants contend that Washington's cigarette tax scheme is preempted by federal law-specifically, the Indian Trader Statutes, 25 U.S.C. § 261, et seq.[14] This argument is foreclosed by the Supreme

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[13] The defendants' contention that the current scheme requires Indian retailers to buy all their cigarettes from in-state wholesalers is erroneous. Washington merely requires wholesalers, whether located within or without the state, to buy stamps from the state and affix them to all unapproved cigarette packages prior to distribution within the state.

[14] The Indian Trader Statutes provide, in relevant part:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be

Court's decision in Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 114 S. Ct. 2028 (1994).

In Milhelm Attea, the Supreme Court held that New York's cigarette tax scheme, which is substantially similar to the Washington scheme at issue in this case, was not preempted by the Indian Trader Statutes. The Court explained that, "[j]ust as tribal sovereignty does not completely preclude States from enlisting tribal retailers to assist enforcement of valid state taxes, the Indian Trader Statutes do not bar the States from imposing reasonable regulatory burdens upon Indian traders for the same purpose. "Milhelm Attea, 114 S. Ct. at 2036. As long as the incidence of the tax ultimately falls upon non-Indians, the Court determined, the Indian Trader Statutes permit the states to require Indians to precollect it. Id. Moreover, the Court held New York's preapproval requirement for unstamped cigarettes delivered to Indian reservations, and its "probable

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sold to the Indians.

demand" quota on tax-free cigarettes, did not dictate "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Id. (quoting 25 U.S.C. § 261). The same holds true for Washington's cigarette tax scheme.

The defendant's attempt to distinguish Milhelm Attea is unconvincing. They contend that, whereas Milhelm Attea the wholesalers-who were not Indians-were required to prepay state taxes on cigarettes distributed to Indian retailers for purposes of sale to non-Indians, in this case the prepayment requirement falls directly upon the Indian retailers.

The argument misconstrues the nature of the statutory scheme in Milhelm Attea. There, New York's scheme, like Washington's, required all wholesalers, regardless of their race, to prepay the tax on unapproved cigarettes. The tax would then be passed on to retailers, including Indian retailers, and ultimately to non-Indian consumers. Moreover,

the Supreme Court's decision in Milhelm Attea was based on the assumption that states can validly impose a prepayment requirement directly on reservation retailers. The Court explained "[i]t would be anomalous to hold that a State could impose tax collection... burdens on reservation retailers who are themselves enrolled tribal members... but that similar burdens could not be imposed on wholesalers, who often (as in this case) are not." Milhelm Attea, 114 S. Ct at 2036.

Milhelm Attea directly controls the preemption issue in this case. Washington's cigarette tax scheme, like the New York scheme approved in Milhelm Attea, is not preempted by the Indian Trader Statutes by virtue of the fact that it imposes a prepayment requirement on Indian retailers.

c. Equal Protection

Defendant Baker argues that Washington's cigarette tax scheme violates the Equal Protection Clause. Equal protection claims are questions of law which we review de novo, United States v. Harding, 971 F.2d 410, 412 (9th Cir.

1992), cert. denied, 113 S. Ct. 1025 (1993).

Washington Revised Code § 82.24.040(2) permits wholesalers licensed by the state who furnish a surety bond to the Department of Revenue to set aside a stock of unstamped cigarettes for purposes of sale to Indian tribes if "it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place. "Baker complains this provision violated equal protection because it applies only to Indian tribes and to federal instrumentalities. He also challenges section 458-20-192 of the Washington Administrative Code on the ground that it places a burden only on Indian tribes, and not on federal instrumentalities to obtain preapproval for the delivery of unstamped cigarettes.[15]

The district court rejected Baker's equal protection

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[15] We note this provision actually does not burden Indian tribes at all. It requires wholesalers selling cigarettes to Indian tribes, not the tribes themselves, to obtain preapproval.

argument because, while Washington is permitted to regulate on-reservation sales of cigarettes by Indians to non-Indians, Colville 447. U.S. at 160, the state cannot regulate cigarettes sold to federal instrumentalities unless Congress consents to the regulation. The ruling was correct. See American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 802 F.2d 1159, 1163, (9th Cir. 1986)(citing Hancock v. Train, 426 U.S. 167, 178-79(1976) for the proposition that "[t]he federal government may control its property free from regulation by the states unless Congress declares that the property is subject to state regulation").

[10] Baker contends that, in the same way Washington cannot tax federal instrumentalities without congressional consent, it cannot tax reservation Indians unless Congress permits it to do so. This much is correct. See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). Washington's tax scheme, however, does not impose any tax on reservation Indians. It merely requires Indian

retailers to prepay taxes to be collected from their non-Indian consumers. This precollection requirement is a permissible, minor burden on Indian trade, Colville, 447 U.S. at 160.

4. Mens Rea

The defendant argue their convictions should be reversed because the government did not prove the requisite mens rea for conviction of the charged crimes. They argue conviction under the CCTA required proof of a defendant's knowledge that his actions violated the law. They also contend that, in order to convict them of the charged conspiracy counts- conspiracy to traffic in contraband cigarettes and conspiracy to violate RICO-the government had to prove they acted with specific intent to violate the law.[16] We first consider the mens rea requirement of the

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[16] The defendants argue the government was required to prove their specific intent to violate federal law. If by this they mean to suggest they cannot be guilty of either conspiracy to violate the CCTA or conspiracy to violate RICO unless they knew their actions violated federal rather than state law, their argument is meritless. Knowledge of the federal nature of an offense is not an essential element of the crime of conspiracy to commit that offense. See United States v. Feola, 420 U.S. 671 (1975); United States v. Hobson, 519 F.2d 765, 769 (9th Cir.), cert. denied sub

substantive CCTA charge.

The CCTA makes it a crime for persons to "knowingly. . . ship, transport, receive, posses, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342 (emphasis added). This provision of the statute requires wilfulness. It does not, however, require knowledge that the actions engaged in violate the law. "A requirement that the conduct be willful generally means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose he is breaking the law." United States v. Scanio, 900 F.2d 485, 489 (2d Cir. 1990).

We have recognized two categories of cases as exceptions to the general rule that ignorance of the law is no

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nom. Newman v. United States, 423 U.S. 931 (1975), United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979), cert. denied, 444 U.S. 831 (1979), on which the defendants rely, is not to the contrary. In that case, the Fifth Circuit held the crime of conspiracy to import a controlled substance into the United States required proof of the defendant's knowledge the substance was destined for the United States rather than some other country. Id. at 1270. The court did not hold that the defendant had to know his actions violated American law.

excuse. United States v. Fierros, 692 F.2d 1291, 1294 (9th Cir. 1982). cert. denied. 462 U.S. 1120 (1983). "The first category involves instances where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime. . . In such a case, the mistake of the law is for practical purposes a mistake of fact. "Id. The second category involves "prosecution under complex regulatory schemes that have the potential of snaring unwitting violators." Id. at 1295. Contrary to the defendants' contention, neither exception applies to this case.

The first exception applies only to a defendant who is reasonably mistaken as to the factual events which form the basis for his prosecution. United States v. Aguilar, 883 F.2d 662, 675 & n.5 (9th Cir. 1989), cert. denied sub nom. Socorro Pardo v. United States, 498 U.S. 1046 (1991). In the present case, this exception would apply if the defendants asserted reasonable grounds to believe the tax on the cigarettes had been paid, but it does not extend to their

assertion that the government was required to prove they knew a tax was due. See United States v. Fierros, 692 F.2d at 1294 (finding exception inapplicable where defendants contended they were unaware the law prohibited transporting and harboring illegal aliens, though it would be available if they asserted a reasonable belief the aliens were legally admitted into the United States).

Nor is the second exception applicable. The interaction between the CCTA and Washington's tax scheme, on which the CCTA violation is predicated, does not involve a complex regulatory scheme with the potential of trapping unwary merchants trading in cigarettes. The law is quite simple. All cigarettes in quantities exceeding 60,000 which are brought into the state must either or preapproved by the state's Department of Revenue.

In analogous cases, the Supreme Court has held that, in order to convict a defendant of possessing heavily regulated articles such as firearms, corrosive liquids and

drugs, the government is required to prove the defendant knew the physical nature of what he possessed, but not that he knew his possession was prohibited. United States v. Freed, 401 U.S. 601 (1971)(firearms); United States v. International Minerals and Chemicals Corp., 402 U.S. 558 (1971) (corrosive liquids); United States v. Dotterweich, 320 U.S. 277 (1943) (drugs). On the other hand, conviction for knowingly possessing or using food stamps in a manner not authorized by statute requires proof the defendant knew his possession or use was unlawful. Liparotta v. United States, 471 U.S. 419 (1985).

The distinction between these cases lies in the fact that, while firearms, corrosive liquids and drugs are dangerous substances that are likely to be regulated, food stamps are a benign article whose prohibited uses may be seemingly permissible. See Liparotta, 471 U.S. at 426.

Cigarettes, at least when possessed in large quantities, are -like drugs, corrosive liquids and firearms -likely to be

regulated. United States v. Elshenawy, 801 F.2d 856, 858-59(6th Cir. 1986), cert. denied, 479 U.S. 1094 (1987).[17] Thus, knowledge of cigarette taxing requirements can be presumed among those who deal in cigarettes in quantities exceeding 60,000. Id. at 859.

The defendants argue the Supreme Court's decision in Ratzlaf v. United States, 114 S. Ct. 655 (1994), supports their contention that a specific intent to violate the law is an essential element of a CCTA violation. We disagree. In Ratzlaf, the Court held that to establish a "wilful" violation of the antistructuring laws, the government must prove the defendant knew his actions were unlawful. Id, at 657. The Court was "mindful of the complex of provisions in which

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[17] The defendants' attempt to distinguish Elshenawy is not convincing. They contend the language of the law at issue in that case was much clearer than is Washington's tax scheme and that, while Elshenawy admitted he assumed the cigarettes in his possession were subject to a tax that had not been paid, the defendants have consistently denied any such knowledge. As stated above, we believe Washington's cigarette tax law is perfectly clear. Moreover, in light of the Sixth Circuit's decision that proof of a defendant's knowledge of the law is not necessary for conviction under the CCTA, Elshenawy's admission was irrelevant to its holding in the case.

[the laws] are embedded." id. at 659, and of the fact that "currency structuring is not inevitably nefarious." Id. at 660-61. See also United States v. Weitzenhoff, 35 F.3d 1275, 1285 (9th Cir. 1993) (The Ratzlaf "Court recognized that the money structuring provisions are not directed at conduct which a reasonable person necessarily should know is subject to strict public regulation and that the structuring offense applied to all personas with more than $10,000, many of whom could be engaged in structuring for innocent reasons."). The Court also emphasized its intent not to "dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge." Ratzlaf, 114 S. Ct. at 663. See also Cheek v. United States, 498 U.S. 192, 199-200 (1991) (finding knowledge of law required for conviction of violating the federal tax code because the "complexity" of the scheme could potentially ensnare "the average citizen.").

[1] As we said earlier, the CCTA and Washington's

cigarette tax scheme are not so complex as to create the danger of innocent violation. We conclude conviction under the CCTA does not require proof that a defendant knows his conduct violates the law. We next consider the mens rea requirement for conviction of the conspiracy counts.

The defendants challenge their convictions for conspiracy to violate the CCTA and conspiracy to violate RICO by pointing out that the indictment alleged they knowingly and willfully conspired, confederated and agreed to form a RICO enterprise and deal in contraband cigarettes. They contend the word " `wilfully' establishes a more exacting standard then `knowingly' and... connotes an act which is... committed with the specific intent to do... what a defendant knows is unlawful." Even if the word "willfully" had not been used in the indictment, they argue intent to violate the law is an essential element of the crime of conspiracy.

[12] Establishing a defendant's guilt of conspiracy to

commit a substantive crime requires proof of the mens rea essential for conviction of the substantive offense itself. United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied sub nom. Teitelbaum v. United States and Jacobs v. United States, 401 U.S. 924 (1971). No greater or different intent is necessary. Id. As we explained above, a conviction of the substantive CCTA count does not require proof of a specific intent to violate the law. Therefore, neither does a conviction for conspiring to engage in activities which violate the CCTA.

Similarly, a defendant can be guilty of conspiring to violate RICO if he possesses the mental state necessary for conviction of the substantive RICO offense. See Roselli, 432 F.2d 879. The mens rea element necessary for a substantive RICO conviction is the same as is required for the predicate crime, in this case violation of the CCTA. United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). Because the CCTA does not require proof

of intent to violate the law, the defendants can be guilty of conspiring to violate RICO even if they were not aware their actions were illegal.

The fact that the word "willfully" was used in the indictment does not change this result. As the district court held, the pertinent language in the indictment charges that the defendants "did knowingly and willfully conspire, confederate and agree to knowingly ship, transport receive, possess, and distribute contraband cigarettes." As used in the indictment, "wilfully" modifies "conspire, confederate and agree," not "ship, transport, receive, possess, and distribute contraband cigarettes." Therefore, even if we were to assume the definition of "willfully" offered by the defendants is correct, it does not entitle them to the relief they seek.

The defendant's definition of "wilfully," however, is not correct as applied to this case. They rely on United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976). Such reliance is misplaced. In Lizarraga, we interpreted the

work "willfully" as used in 22 U.S.C. § 1934 to require a specific intent to violate a known legal duty. Id at 828. We interpreted "willfully" in this manner because section 1934 prohibits exportation of items listed by administrative regulation, not by the statute itself; and the regulation contains an exhaustive list of items not generally know to be governmentally controlled. Id. Therefore, a lesser mens rea requirement would potentially criminalize innocent or negligent errors. Id. As we explained above, no similar danger exists with respect to the CCTA. See also United States v. Scotto, 641 F.2d at 56 (word "willfully" in RICO statute does not require specific intent to violate the terms of statute).

5. Multiplicitous Conspiracy Counts

The defendants contend the charge of conspiracy to violate RICO and the charge of conspiracy to violate the CCTA allege one and the same conspiracy, and as a result the defendants cannot be convicted and punished for both.

The circuits appear to be in disagreement whether a conspiracy to violate RICO and a conspiracy to commit the predicate offense on which the RICO conspiracy is based are the "same offense" under the Blockbuger test. Compare United States Kragness, 830 F.2d 842 (8th Cir. 1987) and United States v. Johnson, 911 F. 2d 1394, 1398 (10th Cir. 1990), cert. denied, 498 U.S. 1050 (1991), with United States v. Deshaw, 974 F.2d 667 (5th Cir. 1992).[18] Whether they are or not, however, conviction and punishment for both is permissible. "[T]he Supreme Court has repeatedly emphasized that, at least in cases where cumulative punishments are imposed in a single prosecution, the Blockburger rule is a tool of statutory construction used to determine legislative intent rather than a constitutional 'litmus test' that imposes a conclusive presumption of law."

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[18] Our circuit has previously suggested, in affirming a defendant's convictions on both drug conspiracy and RICO conspiracy charges where the RICO conspiracy was predicated on the drug offense, that the offenses are not the same for purposes of Blockburger. United States v. Ryland, 806 F.2d 941, 942-43 (9th Cir. 1986) cert. denied, 481 u.S. 1057 (1984).

United States v. Kragness, 830 F.2d at 863 (citing Garrett v. United States, 471 U.S. 773, 778-79 (1985), and Missouri v. Hunter, 459 U.S. 359, 366 (1983). Where the offenses are the same under the Blockburger test, multiple punishments are permitted if Congress intended that they be imposed. Id. See also United States v. Johnson, 911 F.2d at 1398.

"RICO's statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties. United States v. Deshaw, 974 F.2d at 671-72. The statute specifically provides that "[n]othing in [RICO] shall supersede any provision of Federal... law imposing criminal penalties... in addition to those provided for in [RICO]." United States v. Kragness, 830 F.2d at 864 (quoting Pub. L. No. 91-452, § 904(b), 84 Stat. 947). Clearly, Congress "intended to permit, and perhaps sought to encourage, the imposition of cumulative sentences for RICO offenses and the underlying crimes." Id.

[13] We reject the defendant's argument that their

convictions and sentences for conspiracy to violate RICO and conspiracy to violate the CCTA are precluded because they are multiplicitous.

6. Sufficiency of the Evidence.

In reviewing the sufficiency of the evidence to support a conviction, we search the record to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 301, 319 (1979); United v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994).

a. Money-Laundering Counts

Baker challenges his money-laundering convictions. He contends the government presented insufficient evidence to prove he engaged in a financial transaction "with the intent to promote the carrying on" of unlawful activity, as required by 18 U.S.C. § 1956(1)(A)(i). This claim is meritless. The government presented abundant evidence of payments Baker

made to the Clinkenbeards for the purchase of contraband cigarettes. Baker could not have continued the illegal trafficking without paying his cigarette suppliers. See Untied States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (depositing a check in a bank account suffices to satisfy the requirements of section 1956(a)(B)(i). We reject this argument because the government was not required to prove this fact.

The money-laundering statute provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
> > ....
> >
> > (B) knowing that the transaction is designed in whole or in part-

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;....
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1).

In United States v. Montoya, 945 F.2d 1068, we noted that "subsections (A)(i) and (B)(i) [of the statute] are set forth in the disjunctive." Id. at 1076. In order to convict a defendant under subsection (A)(i), as opposed to subsection (B)(i), the government need not prove the financial transaction in which he engaged was intended to conceal, disguise or otherwise thwart detection of the source of the funds. Id. The indictment charged Baker with violating subsection (A)(i), not subsection (B)(i). It is therefore irrelevant that all Baker's financial transactions were recorded in the bank, all his cigarette orders and payments were

documented, and applicable income taxes were paid on all monies generated by his retail store.

Finally, Baker argues the government failed to prove he knew the funds involved in the money-laundering transactions were proceeds of illegal activity.

There is no dispute that the money-laundering statute "requires the government to prove that a defendant charged with participating in the financial transaction identified in the indictment knew that it involved the proceeds of unlawful activities." United States v. Jackson, 935 F.2d 832, 838 (7th Cir. 1991). In United States v. Stein, 37 F.3d 1407 (9th Cir. 1994), we held that "to sustain a conviction [for money laundering] the defendant must have known that the primary predicate activity... was unlawful." Id. at 1410. What the defendant need not have known is "that the secondary act of laundering the proceeds [of the unlawful activity] was [also] unlawful." Id.

[14] In this case, the primary, predicate activity was

trafficking in unstamped, unapproved cigarettes. The government presented ample evidence showing Baker know this activity was illegal.[19] The jury heard that Baker, over a ten-year period, regularly faxed coded messages to the Clinkenbeard ranch specifying the time and location of a planned meeting. He or his representative would drive an empty van to the secret meeting spot outside of the State of Washington, where they would rendezvous with a Clinkenbeard employee driving a van loaded with unstamped cigarettes. The drivers would then exchange vehicles, after which the van containing the cigarettes would be driven back to Washington and the empty van would be returned to the Clinkenbeard ranch. The vehicles involved in these exchanges had their windows darkened to avoid detection of the cargo.

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[19] In section (4) supra, we concluded only that the government was not required, in order to convict the defendants of violating the CCTA, to prove they knew their trafficking activities violated the law. We did not say the government in fact had not proved the defendants' knowledge of the illegality of their acts.

The evidence also showed that Baker always paid the Clinkenbeards for the unstamped cigarettes with cashier's checks payable to a company by the name of Northwest Display, a fireworks business owned by the Clinkenbeards. Baker instructed his employees at the Shoppe to purchase the cashier's checks in amounts not exceeding $3.000. If more than one check was required for a single cigarette purchase, Baker's employees were instructed to obtain checks from different bank branches. Thus, for example, on January 22, 1991, Baker paid the Clinkenbeards with eight cashier's checks made out to Northwest Display, each in the amount of $2,900 and each drawn at a different branch of the same bank on the same day.

[15] In light of all this evidence, a rational juror easily could have found Baker intended to conceal his involvement in the cigarette purchases, and that he did so because he knew the cigarettes were contraband.

b. Other Counts

Hale asserts the government presented insufficient evidence to prove facts essential to his conviction on the remaining counts.

The government was not required to prove most of the facts upon which Hale contends it presented insufficient evidence. For example, Hale contends the government failed to prove unstamped cigarettes were sold to non-Indians at the Indian Trading Post; that state cigarette taxes were not collected from non-Indians, if in fact sales to non-Indians were made; that there was even a single transaction with a non-Indian involving a quantity of cigarettes in excess of 60,000; that the Indian Trading Post ever had a stock of cigarettes exceeding 60,000; and that the number of unstamped cigarettes delivered to the reservation exceeded the Puyallup Tribe's annual quota. As explained in the preceding sections, these facts are all irrelevant to a CCTA violation and to the other crimes charged in the indictment.

Hale further contends the government presented

insufficient evidence to connect the cigarettes he bought from the Clinkenbeards to the State of Washington, or to prove he ever transported a quantity of unstamped cigarettes exceeding 60,000 into Washington in a single transaction.

There is no basis for this argument. The government presented evidence that surveillance by the Bureau of Alcohol, Tobacco and Firearms revealed truckloads of unstamped cigarettes were delivered to Washington in response to the telephonic orders Hale placed with the Clinkenbeards. Over a period of years, Hale, his son or his employees made twice-weekly trips to pick up anywhere from 50 to 90 cases of unstamped cigarettes and bring them into Washington. When a search warrant was executed at the Indian Trading Post in November 1991, numerous cases of unauthorized, unstamped cigarettes were found in its stock. There was ample evidence to convict Hale of all the charges against him.

7. Speedy Trial Violation

Baker argues the Speedy Trial Act, 18 U.S.C. § 3161, is unconstitutional because it tolls the speedy trial period as to each defendant whenever a codefendant files a pretrial motion. 18 U.S.C. § 3161(h). Baker contends the delay occasioned by the acts of one codefendant cannot be attributed to another without violating the Constitution's speedy trial guaranty, unless the other codefendant specifically waives his right to a speedy trial.

The district court rejected Baker's argument on the basis of United States v. Butz, 982 F.2d 1378 (9th Cir. 1993), cert. denied, 114 S. Ct. 250 (1993). In Butz, we confirmed that, under the Speedy Trial Act, delays caused by one defendant are excluded from the speedy trial clock as to all codefendants. Id. at 1381. We did not consider the constitutionality of this provision of the Speedy Trial Act, as Baker asks us to do in this case.

The Speedy Trial Act requires that trial commence within 70 days of the filing of the indictment or from the

date the defendant appears before a judicial officer or a court, whichever comes last. 18 U.S.C. § 3161(c)(1). No court has ever held this 70-day period is guaranteed by the Constitution.

In United States v. Brainer, 691 F.2d 691 (4th Cir. 1982), the Fourth Circuit upheld the Speedy Trial Act against a constitutional challenge based on a separation of powers theory. In doing so, the court recognized that "the Sixth Amendment...secures certain minimal trial rights against encroachment by government," but "[i]n no way...prevent[s] Congress from according the accused more protection than the Constitution requires." Id. at 698. Brainer suggests the Speedy Trial Act affords greater protection to a defendant's right to a speedy trial than is guaranteed by the Sixth Amendment, and therefore a trial which complies with the Act raises a strong presumption of compliance with the Constitution. See United States v. Fuller, 942 F.2d 454, 457 (8th Cir.) (rejecting the defendant's Sixth Amendment speedy

trial challenge because any delay was caused by his codefendants' various motions, and under the Speedy Trial act, this time properly counts against the defendant), cert. denied, 502 U.S. 914 and 502 U.S. 1039 (1991).

[16] The Constitution does not set a specific time period within which a trial must occur. Rather, Sixth Amendment speedy trial claims are assessed by considering a combination of factors, including: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant. United States v. Baker, 10 F. 3d 1374, 1401 (9th Cir. 1993) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). Applying these factors, there may be some situations in which tolling the speedy trial clock due to a codefendants's actions may violate another defendant's Sixth Amendment right. But this does not render the Speedy Trial Act unconstitutional as a matter of law.

[17] In this case, Baker has made no showing that

the length of time between his initial court appearance and the commencement of the trial caused him prejudice, the fourth Baker factor. It is unnecessary, therefore, for us to address the remaining Baker factors. See United States v. Davis, 1 F.3d 1014, 1018 (10th Cir. 1993). There was no Sixth Amendment speedy trial violation.

8. District Court's Comment on Potential for Appeal

The defendants next argue they are entitled to reversal of their convictions because the district court told the jury the defendants could appeal an adverse verdict. They contend this diluted the jury's sense of final responsibility for the verdict.

Because the defendants did not object to the district court's comments, we review theses comments for plain error. United States v. Greenberg, 445 F.2d 1158, 1162 (2d Cir. 1970).

[18] Comments by a trail court about the potential for appeal are inappropriate, but "reversal does not follow

automatically merely because a trial judge succumbs to a bad idea." United States v. Arcadipane, 41 F.3d 1, 9 (1st Cir. 1994). See also United States v. Greenberg, 445 F.2d at 1162 (holding that, while "[i]t might have been better procedure not to have told the jury that if they convicted upon an erroneous charge they did 'not have to worry' because [an appellate] court would reverse if there were error," reversal was not warranted on this basis). Rather, challenges to such comments are treated like all other challenges to a jury charge. "the court of appeals must examine the charge as a whole to determine if the judge balanced the instructions, correctly informed the jurors of the governing law, imbued the jurors with an appropriate sense of responsibility, and avoided undue prejudice." United States v. Arcadipane, 41 F.3d at 8.

[19] Viewed in the context of this case, the trial judge's comments did not impermissibly relieve the jury of its sense of responsibility for the verdict.

At the beginning of its charge to the jury, the district court instructed as follows:

> Now you are bound and obligated to follow the law as instructed by the court, and this is the way our system works. In the event that one or more of the defendants here is or are convicted in this case, that is, found guilty by the jurors, they may take an appeal to the Ninth Circuit Court and that court, being a higher and wiser court than this one, will look to see what this court's instructions to the jury were. And if those instructions are substantially erroneous, then, of course, the higher court will reverse and remand in all likelihood.
>
> It may well be that this is a case that will go to the Supreme Court of the United States. I don't know. I've had some cases go there. This one has the potential for it.
>
> In the event that the jury might not follow the court's instructions, then our system can't work. And so you folds have got to take the law as I give it to you, and you have to recognize that I am the judge of the law, that you are the judges of the facts.
>
> You folks have the sole and exclusive province and duty of ascertaining and determining what the facts are. But not so, the law. That's what makes our system work.

> Now, speaking of the judges of the facts, your function is to determine what the facts are...
>
> You are the sole judges of the facts...You should not consider any comment by the court as a comment on the credibility of a witness or the validity of any physical evidence. The question of credibility of the witnesses is entirely for you folks as the judges of the facts.

[20] The defendants correctly cite United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962), for the proposition that "[c]comments which tend to shift the jury's final responsibility to another tribunal are inappropriate." United States v. Grimsley, 419 F.2d 387, 387 (5th Cir. 1969). But in this case, as was the case in Grimsley[20] and

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[20] In Grimsley, the following comment by the trial court was considered insufficient grounds for reversal of the defendants's conviction:

> This young man seated over here between you and I writes down everything that I say concerning every rule and if the occasion should present itself, then the injured party would have an opportunity to have--and if it is necessary because of the nature of the verdict--some other court at some other time could review my rulings as to whether or not they were correct or not.

United States v. Grimsley, 419 F.2d at 387.

Arcadipane,[21] the judge's comment were directed toward review of his own rulings, not the jury's. Moreover, the judge informed the jurors they were the sole and final judges of the facts. See United States v. Ferra, 900 F.2d 1057, 1060 (7th Cir. 1990).[22] In these circumstances, although discussing the appellate process with the jury may have been unwise, it was not plain error.

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[21] In Arcadipane, the court refused to reverse the defendant's conviction based on the following comment by the trial judge:

> You are the judges of the facts, and I will leave to you entirely the judgment of the facts. I ask you to leave to me entirely the judgment as to the law.
>
> You should also understand that if I am in error, there is a higher court that can and cheerfully will reverse me. However, there is no higher court that will review your judgment of the facts. You are the only, the final judges of the facts in this case.

United States v. Arcadipane, 41 F.3d at 8.

[22] In Ferra, the following comment by the judge did not require reversal of the defendant's conviction:

> If I tell you what the law is and I tell you wrong, why, an appellate court can straighten me out, but nobody else determines what the facts are. You do that, and so it's important that you do it with devotion to the task.

9. Request for Subpoenas and "Good Faith" Instruction

The defendants challenge the district court's denial of their requests for subpoenas for various proposed witnesses and for payment of the witnesses' travel expenses. They also contend the district court erred in refusing to instruct the jury on the defense of good faith. These arguments are essentially a restatement of the mens rea argument we considered and rejected in section (4) supra.

The witnesses the defendants sought to have subpoenaed would have testified that the Puyallup Tribe believed the Medicine Creek Treaty precluded the state from exercising taxing authority on the reservation. As explained previously, the Tribe's mistake as to the law is not a proper defense to a CCTA violation. The district court was not required to subpoena and admit the testimony of witnesses who would have provided irrelevant evidence.

For the same reason, the district court was not required to instruct the jury on the defendant's good faith

defense. Good faith is not a defense to the charged crimes. The district court correctly instructed the jury on the requisite intent for conviction under the CCTA. Nothing more was required.

10. Other Proposed Jury Instructions

Hale argues the district court also erred in not giving various other proposed jury instructions. The government responds that Hale did not object to the district court's failure to give these instructions, and Hale does not dispute this. Therefore, we review the court's failure to give these instructions for plain error. United States v. Smith, 891 F.2d 703 (9th Cir. 1989); United States v. Kessi, 868 F.2d 1097, 1102 (9th Cir. 1989).

The majority of the proposed jury instructions Hale contends the court should have given to the jury are misstatements of the law as discussed in the sections above. The instructions would have erroneously informed the jury that: the CCTA is not applicable to Indians, cigarettes in

transit to Indian reservations are not subject to taxation, the Medicine Creek Treaty precludes states from imposing taxes on cigarettes traded by Indians, Washington law does not impose a tax on cigarettes until the first sale to a non-Indian, and convictions under RICO and the CCTA require proof that the defendant knew his actions violated federal law. The district court properly refused to give these instructions.

The remainder of Hale's proposed jury instructions--dealing with the burden of proof, the credibility of witnesses, and the elements of the various crimes charged in the indictment---are repetitive of instructions which the district court did give.

The district court did not err in refusing to give Hale's proposed instructions.

11. Motion for Arrest of Judgment or New Trial

The district court denied Hale's motion for arrest of judgment or a new trial. We review the court's decision not to grant the motion for abuse of discretion. United States v.

George, 960 F.2d 97, 101 (9th Cir. 1992).

Hale's motion before the district court asserted a variance between the indictment and the court's instructions to the jury.[23] He argued that, while the indictment charged him with "transporting, shipping, receiving, possessing, and distributing" contraband cigarettes, the court instructed the jury it could find him guilty of violating the CCTA if it found that he "sold or purchased" the cigarettes.[24] As the district court held, this argument is specious. "Distributing" includes "selling" and "receiving" includes "purchasing." There was no variance between the indictment and the jury instructions. Hale's motion for a new trial or arrest of judgment was properly denied.

12. Sentencing Manipulation

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[23] Hale argued, in addition, that based on Ratzlaf v. United States, which was decided after is trial, contraband cigarette trafficking should be treated as a specific intent crime. We considered and rejected this argument in section (4) supra.

[24] Hale made no objection at trial to the instructions given to the jury.

Baker argues for the first time on appeal that he is entitled to reversal of his conviction because the government improperly engaged in sentencing manipulation. He contends the government unnecessarily prolonged its investigation of the contraband cigarette trafficking scheme for the sole purpose of increasing the coconspirators' sentencing exposure. Such sentencing manipulation, he contends, is a bar to prosecution.

A district court's "determination as to whether improper [sentencing] manipulation exists is ordinarily a fact-bound determination subject to clear-error review." United States v. Gibbens, 25 F. 3d 28, 30 (1st Cir. 1994). Because Baker did not raise this issue in the district court, however, he must demonstrate plain error.[25] Fed. R. Crim. P. 52(b). See also United States v. Jones, 18 R.3d 1145, 1152 (4th Cir.

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[25] Baker argues he was not required to raise this issue before the district court because "the potential evil of sentencing manipulation [cannot] be gauged until the sentence has been passed." This may or may not be true, but nothing prevented Baker from raising the sentencing manipulation issue to the district court when it announced its sentence.

1994).

The viability of sentencing manipulation as a valid doctrine is uncertain. No court has held, however, that sentencing manipulation can serve as a complete bar to prosecution. In United States v. Jones, on which Baker relies, the Fourth Circuit, in suggesting outrageous government conduct can serve as a valid defense to a crime, warned that "[a]s a practical matter, only those claims alleging violation of particular constitutional guarantees are likely to succeed." Jones, 18 F.3d at 1154. There is no such allegation in this case.

Our circuit has held that sentencing "entrapment" may be a proper basis for a downward departure at sentencing. United States v. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994); United States v. Garza-Juarez, 992 F.2d 896, 911-12 (9th Cir. 1993), cert. denied, 114 S. Ct. 724 (1994). "Sentencing entrapment...occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in[to]

committing a greater offense subject to greater punishment.'" United States v. Staufer, 38 F.2d at 1106 (quoting United States v. Stuart, 923 F.2d 607, 614 (9th Cir.), cert. denied, 499 U.S. 967 (1991)).

[21] Baker does not contend he was subjected to this form of "sentencing entrapment." He asserts only that the government stretched out its investigation after it had sufficient evidence to indict. This may be true, but we decline to adopt a rule that, in effect, would find "sentencing manipulation" whenever the government, even though it had enough evidence to indict, opts instead to wait in favor of continuing its investigation. See Jones, 18 F.3d at 1155.

[22] Such a rule "would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors." Id. at 1145. "Police...must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace...deeper into the distribution hierarchy." United States v. Calva, 979

F.2d 119, 123 (8th Cir. 1992). See also United States v. Shephard, 4 F.3d 647, 649 (8th Cir. 1993), cert. denied, 114 S. Ct. 1322 (1994). Moreover, since the government has the burden of proving its case beyond a reasonable doubt, it must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained. We reject Baker's sentencing manipulation argument.

13. Government's Cross-Appeal

The government argues on cross-appeal that the district court erred in calculating the defendants' sentences by: (1) failing to increase their offense levels based on the value of funds involved in the money-laundering activities; (2) granting each defendant a two level decrease in his offense level for acceptance of responsibility; (3) decreasing Baker's offense level by four levels for medical reasons; and (4) granting Hale a four level decrease in his offense level for aberrant behavior.

The government conceded at oral argument that it never objected to the district court's calculation of the defendants' sentences on any of these specific grounds. Our review of the record confirms this. At most, the government lodged a general objection to the court's calculation of the defendants' offense levels. This is not enough. A challenge to an adjustment of an offense level must be raised specifically at sentencing in order to afford the district court an opportunity to correct any potential error. A challenge that is not properly raised in the district court is waived. United States v. Parker, 991 F.2d 1493, 1501 (9th Cir.), cert. denied, 114 S. Ct. 121 (1993); United States v. Visman, 919 F.2d 1390, 1393-93 (9th Cir. 1990), cert. denied, 112 S. Ct. 442 (1991). We therefore decline to consider the government's cross-appeal.

## CONCLUSION

The defendants were properly convicted of all the charges against them. We reject all their challenges to their

convictions and sentences. We decline to consider the government's cross-appeal.

AFFIRMED.

## APPENDIX B

BEFORE THE COURT are Defendant John Cook's and Terry Tonasket's Motions to Dismiss the Indictments pursuant to Fed. R. Crim P. 12(b) (2) (CR-94-094, Ct. Rec. 38 and CR 04-095, Ct. Rec. 52) and Defendant John Cook's Motion for Suppression of Evidence and Return of Proceeds pursuant to Fed. R. Crim P. 12(b)(3) (CR-94-095, Ct. Rec. 41).[26] Assistant United States Attorney Chris McLean represents Plaintiff. Aaron Love represents Defendant Kurt Brigman. Bob Kovacevich represents Defendant Terry Tonasket. Leslie Weatherhead represents Defendant Joanne Cook.

A hearing on Defendants' pretrial motions was held on July 29, 1994. The court reserved ruling on Defendants'

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[26] All Defendants have joined in all Co-Defendant's Motions. Therefore, John Cook's and Terry Tonasket's Motions to Dismiss and John Cook's Motion to Suppress Evidence and Return Proceeds will be treated as a joint motion of all Defendants to dismiss and a joint motion of all Defendants to suppress evidence and return proceeds.

Motion to Dismiss and Motion to Suppress Evidence and Return Proceeds, and asked the parties to submit additional authorities regarding the rights of Indians under Washington law to possess unstamped cigarettes. On August 30, 1994, after reviewing the supplemental briefing, the court heard further argument on the motions telephonically. Having reviewed the record, including the supplemental briefing, heard from counsel on several occasions, and being fully advised in this matter, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the Indictments is GRANTED and Defendants' Motion to Suppress Evidence and Return Proceeds is GRANTED. However, the rulings herein should not be construed in any way to interfere with the right of the State of Washington to tax and require payment by Indian cigarette retailers of State taxes on the sale of cigarettes to non-Indians, as discussed infra. See pp. 14-20.

## STATEMENT OF THE CASE

Defendants, enrolled members of the Colville Indian

Tribe, are charged with conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2341, et seq., which makes it unlawful for any person to knowingly ship, transport, receive, possess, sell, distribute, or purchase "contraband cigarettes." 18 U.S.C. § 2341 defines "contraband cigarettes" as

> a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person...

(Emphasis added.)

The Indictments in this case charge these Defendants with a conspiracy to knowingly and willfully transport, receive, and possess cigarettes "which bore no evidence of the payment of applicable State cigarette taxes as required by Washington State law..." The Government's prosecution of these Defendants is based upon that portion of the CCTA

which makes it an offense to transport and/or possess cigarettes without required tax stamps affixed. The Indictments are based only on the contention that these Defendants agreed to and did obtain cigarettes from Montana distributors that did not bear Washington State tax stamps, transported the unstamped cigarettes across state lines into Washington, and possessed the unstamped cigarettes in Washington.

What is not at issue in this case is the authority of the State of Washington to impose and enforce collection of a tax upon the purchase of cigarettes by non-Indians from Indian smoke shops. That right is clearly established. See Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc., _____ U.S. _____, 114 S. Ct. 2028 (1994). Rather, the issue is whether Washington law prohibits a tribal Indian from obtaining unstamped cigarettes out of state, transporting them into Washington, and possessing the unstamped cigarettes in Washington as a

violation of state law, thereby forming the necessary predicate offense for application of the federal Contraband Cigarette Trafficking Act as to these Defendants.

Clearly,a violation of the CCTA requires, as a predicate, a violation of state law. If Washington law does not prohibit these Defendants from obtaining unstamped cigarettes out of state, transporting them into Washington and possessing them in Washington, they cannot be guilty of violating the federal criminal CCTA as charged in the Indictments.

The Government recognizes that it has a problem in that "there is an apparent, seeming conflict in what the State of Washington [statutes and] regulations say and what the policy of the Department of Revenue has been since 1988." Transcript of Proceedings, Pretrial Conference/Motion Hearing, July 28, 1994 at p. 8. The court finds that this "conflict" is a real one, rather than an apparent one, and creates an insurmountable hurdle for the Government in these

cases.

The Government charges as overt acts that:

> On or about October 31, 1991 John Cook traveled from J&J's Smoke Shop, Okanogon, Washington to the Busted Ass Ranch, Arlee, Montana for the purpose of picking up cigarettes which bore no evidence of the payment of applicable State cigarette taxes as required by the State of Washington
>
> On or about October 31, 1991 John Cook transported cigarettes which bore no evidence of the payment of applicable State cigarette taxes as required by Washington State law from the Busted Ass Ranch, Arlee, Montana to J&J's Smoke Shop, Okanogon, Washington.

The other charges contained in the Indictments are identical except for the name of the Defendant involved, and the name and location of the Washington smoke shop involved. These acts are not prohibited under Washington statutes and regulations, although these acts are not in accordance with an unwritten policy of the Washington Department of Revenue.

Washington law, found in the Revised Code of

Washington (RCW) and the Washington Administrative Code (WAC), clearly provides that enrolled Indians are entitled to purchase and possess unstamped cigarettes for their own consumption and/or for sale to other tribal Indians. Additionally, as conceded by counsel for the Government in the August 30, 1994 arguments, there is no RCW or WAC provision prohibiting Indians from buying unstamped cigarettes out of state, and bringing them into Washington.

RCW §2.24.020 levies a tax upon the "sale, use, consumption, handling, possession, or distribution" of all cigarettes. WAC 458-20-186 provides that the cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state. To enforce collection of the tax levied, tax stamps are printed by the Department of Revenue, and are to be affixed to the "smallest container or package" of cigarettes that will be handled or sold. R.C.W. 82.24.030. RCW 82.24.080 provides in pertinent part:

> It is...the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state:...

The Washington Administrative Code provides that "every [Washington] licensed stamping wholesaler" must stamp the "cigarettes that require stamping within 72 hours after receipt, but in any event, on or before transfer or sale to another party" and that anyone else must file with the Department of Revenue a notice of intent to possess unstamped cigarettes in the State of Washington and must bring the unstamped cigarettes to the Department of Revenue "for payment of the tax within 72 hours of receipt, but in any event, on or before sale or transfer to another party." WAC 458-20-186.

RCW 82.24.040 and 82.24.050 set forth the duties of Washington cigarette wholesalers and retailers regarding cigarette tax stamps. These statutes clearly provide exceptions to the general rule regarding Indians, and are at

odds with the Government's contention that only licensed Washington wholesalers are authorized to affix tax stamps to cigarettes, and must do so to all cigarettes regardless of their ultimate destination and disposition.

RCW 82.24.040 provides that no wholesaler in this state may possess, within this state, unstamped cigarettes except that:

> (2) Any wholesaler in the state who is licensed under Washington state law...shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales...to the established governing bodies of any Indian tribe.

RCW 82.24.050 sets forth the duties of cigarette retailers, and can only be read as presupposing that the Washington retailers may be obtaining cigarettes from distributors who are not licensed Washington wholesalers. Only Washington wholesalers would have been required to affix the tax stamps before selling them to a retailer. The

wholesalers in this case were not located in the State of Washington. RCW 82.24.050 also recognizes the Indian's right to possess unstamped cigarettes:

> No retailer in this state may possess unstamped cigarettes within this state unless the retailer is licensed under Washington state law and, within a period of time after receipt of any of the articles taxed herein as is reasonable necessary for the purpose, causes the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: Provided, that those articles to which stamps have been properly affixed by a wholesaler or another retailer, licensed under Washington state law, may be retained by any retailer, and that those articles intended for sale to qualified purchasers may, under rules adopted by the department of revenue, be retained by
> ...Indian tribal organizations, without affixing the stamps required by this chapter.

Thus, RCW 82.24.040 provides that every Washington licensed wholesaler, who complies with Department of Revenue record-keeping duties, is permitted to set aside a portion of his stock without affixing tax stamps for sale to an Indian tribal organization. Likewise, RCW 82.24.050

imposes on every licensed retailer the duty to affix the required denomination of stamps, except where the sale is to an Indian tribal organization. It is not disputed that the Indian smoke shops in this case are Indian tribal organizations.

The government recognizes that RCW 82.24.040 and .050 provide exceptions to the stamping requirement for Indians, but argues that W.A.C. 458-20-192 somehow supersedes these provisions. The court finds otherwise. WAC 458-20-192 provides that sales of cigarettes by Indians to non-Indians are subject to state cigarette tax, which is not at issue in this case. "[S]ince the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax," the regulation requires Indian vendors making or intending to make such sales to non-Indians to purchase a stock of cigarettes with the Washington State cigarette tax stamps already affixed, even though the Indians themselves are exempt from the state tax. WAC

458-20-192 further provides:

> "However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers..."Qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her own use other than for resale."

Likewise, R.C.W. 82.24.110(8) specifically excludes those persons permitted to possess unstamped cigarettes (tribal Indians) from the state misdemeanor provision: It provides that it is a misdemeanor:

> for any retailer, except one permitted to maintain an unstamped stock to engage in interstate business...to have in possession in any place of business any of the articles herein taxed, unless the same have the proper stamps attached.

Thus, these Defendants, are specifically excluded from this misdemeanor statute as enrolled members of an Indian tribe, who are permitted under Washington law to possess a stock of unstamped cigarettes.

The Washington statutes and regulations clearly

indicate an awareness that, although the State ;can regulate the on-reservation sale of cigarettes to non-Indians, the Indians themselves are exempt from the state cigarette tax, and thus, are allowed to possess cigarettes not bearing tax stamps for their own use or for sale to other Indians. There is nothing in the Washington statutes or regulations that prohibits an Indian from purchasing unstamped cigarettes in Washington or out of state for resale to "qualified purchasers" as defined in W.A.C. 458-20-192, supra.

Washington courts have recognized this Indian exception. In a case involving Defendant Terry Tonasket's Grandfather, Tonasket v. State of Washington, 84 Wn. 2d 164, 525 P. 2d 744 (1974) the Washington Supreme Court made it clear that Washington law as of that date allowed Mr. Tonasket to possess unstamped cigarettes:

> Since Mr. Tonasket was purchasing cigarettes from an Oregon distributor for resale to reservation Indians as well as to non-Indians, it would appear logical to conclude that the first taxable event would be the resale of the

> cigarettes to a non-Indian at which time Mr. Tonasket could be required to affix the tax stamp and collect the amount of the tax from the non-Indian customer...

Id. at 181 (Emphasis added). "In February, 1967, Mr. Tonasket was entitled to have unstamped cigarettes in his possession for resale to reservation Indians." Id. at 182.

The Washington legislature has subsequently revised its laws regarding cigarette taxes; however, the law as it exists in September 1994 still provides that tribal Indians are entitled to have unstamped cigarettes in their possession for consumption by and resale to reservation Indians. The Court in Gord v. Department of Revenue, 50 Wn. App. 646, 654, 749 P. 2d 678 (1987) stated:

> Notwithstanding whether Mr. Baker qualifies as a wholesaler, Mr. Baker ;would be excepted from affixing stamps to cigarettes under R.C.W. 82.24.040 (duties of a wholesaler) or R.C.W. 82.24.050 (duties of a retailer) if the record revealed that the cigarettes he possessed were for sales to "established governing bodies" of an Indian tribe.

Id. at 654.

The United States Supreme Court in Washington v. Confederated Tribes of the Colville Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) addressed the issue of Washington's ;cigarette tax as it applied to members of the Colville Indian Tribe. The Court recognized that the Washington cigarette tax was imposed upon the first taxable event, and noted that "[W]here the wholesaler or retailer is an Indian on whom the tax cannot be imposed...the first taxable even this the use, consumption or possession by the non-Indian purchaser." Id. at 142, n. 9 (internal citation omitted).

The Court continues to recognize the critical distinction between a state's right to tax cigarettes sold on a reservation to non-Indian purchasers, and the Indian's right to possess unstamped, untaxed cigarettes. In Milhelm Attea, supra, the Court stated:

This is another case in which we must

> reconcile the plenary power of the State over residents within their borders with the semi-autonomous status of Indians living on tribal reservations...
>
> The specific kind of state tax obligation that New York's regulations are designed to enforce -- which falls on non-Indian purchasers of goods that are merely retailed on a reservation - stands on a markedly different footing from a tax imposed directly on Indian traders,or enrolled tribal members or tribal organizations.

Id., 114 S. Ct. at ;2035. The Court further noted, regarding New York's regulation setting a quota on untaxed cigarettes, that:

> [t]he sole purpose and justification for the quotas on untaxed cigarettes is the State's legitimate interest in avoiding tax evasion by non-Indian consumers. By imposing a quota on tax-free cigarettes, New York has not sought to dictate "the kind and quantity of goods and the prices at which goods will be sold to the Indians." Indian traders remain free to sell Indian tribes and retailers as many cigarettes as they wish, of any kind, and at whatever price. If the Department's "probable demand" calculations are adequate, tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption.

Id. at 2036 (citations omitted). The Supreme Court has never held that a state can prohibit tribal Indians from obtaining, transporting, and possessing unstamped, untaxed cigarettes. Furthermore, the State of Washington has not done so. There is nothing in the Washington statutes or regulations that prohibits an Indian from purchasing unstamped cigarettes in Washington or out of state for resale to "qualified purchasers" as defined in WAC 458-20-192, supra.

THE CONTRABAND CIGARETTE TRAFFICKING ACT

The Contraband Cigarette Trafficking Act (CCTA) was passed in response to congressional findings of widespread traffic and sales of cigarettes, in violation of state tax laws, and a causal relationship between this illegal activity and the rise of criminal racketeering. Accordingly, Congress sought to provide federal assistance to the states in their efforts to stop cigarette smuggling. H.R. Conf. Rep. No. ;1778, 95th Cong., 2d Sess. 1,7 reprinted in 1978 U.S. Code Cong. & Admin. News at 5535-5536. Clearly, a

violation of the CCTA requires a violation of state law as a predicate offense.

It is undisputed that Washington State has a cigarette tax, and that the State requires a stamp to be placed on cigarette packages to evidence payment of that tax. It also is undisputed that enrolled members of Indian tribes are exempt from paying the State's cigarette tax. The question is whether a tribal Indian can be guilty of violating 18 U.S.C. subsection 2342 by obtaining unstamped cigarettes in Montana, transporting them from Montana to Washington, and possessing them in the State of Washington. In other words, the inquiry is whether an enrolled tribal Indian who transports and possesses cigarettes from another state that bear no evidence of the payment of Washington State cigarette taxes in the State of Washington, violates Washington law, thereby triggering applicability of the CCTA.

The court finds that neither Washington statutes and

regulations, nor binding court precedent specifically prohibit an enrolled tribal Indian from purchasing unstamped cigarettes out of state, transporting them across state lines into Washington, and possessing them in the State of Washington. Any Washington tax on those cigarettes becomes due only if the cigarettes are transferred to a non-Indian consumer.

Additionally, there is merit to Defendants' argument that Congress did not intend the Contraband Cigarette Trafficking Act to apply to Indians. The legislative history of the Act suggests that Congress did not intend it to interfere with Indian rights in any way, and believed that it was accomplishing this goal with the "applicable state cigarette tax" language in Section 2342.

> Some concern was expressed in the course of the conference that the definition of 'contraband cigarettes' inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free from state taxation. The

> phrase 'applicable state cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indian or Indian tribes acting in accordance with legally established rights. The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe.

H.R. Conf. No. 1778, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. Code Cong. & Admin. News at 5538.

For all the foregoing reasons, the court finds that the facts alleged in the Indictments are not a violation of Washington law, and, therefore, do not establish the predicate offense necessary for a violation of the federal criminal CCTA.

The court's finding that Washington law does not prohibit the alleged acts of these Defendants means that no federal criminal offense has been stated in the Indictments.

Assuming the facts as alleged in the indictments to be true, that these Defendants obtained

unstamped cigarettes out of state, transported them into Washington and possessed them in Washington, the Defendants did not possess cigarettes bearing no evidence of applicable state cigarette taxes in a state requiring a stamp to evidence payment of cigarette tax, because, as enrolled tribal Indians, Washington does not require a stamp as evidence of tax on cigarettes possessed by them; and they cannot be guilty of a violation of the federal criminal Contraband Cigarette Trafficking Act for committing the acts alleged in the Indictments.

However, Defendants' argument that no state cigarette taxis ever applicable to Indians' rights to buy, possess, and sell non-taxed unstamped cigarettes must fail.

STATE CIGARETTE TAXES AND INDIANS

Defendants contend that no state cigarette tax is ever applicable to enrolled tribal Indians, and that, therefore, there is no requirement ever that cigarettes in an Indian's possession bear a stamp to evidence payment of the tax. The

Government argues that the Washington State Department of Revenue requires a Washington State tax stamp to be laced on all cigarettes possessed in Washington, including those possessed by enrolled tribal Indians, although the Indians are not required to pay the State tax, and can apply for a refund of the state tax paid. It is the Government's position that a Washington licensed wholesaler must place tax stamps on all cigarettes before distributing them to whatever source, and that cigarette retailers, including enrolled tribal Indian retailers, can only obtain cigarettes from licensed Washington wholesalers, and can receive only cigarettes bearing tax stamps. The court finds the Government's argument lacks merit, as discussed above. However, Defendants' position that the state cannot regulate in any way the Indians' rights to possess unstamped cigarettes is also without merit.

The Supreme Court has not yet dealt with the criminal Contraband Cigarette Trafficking Act. However, it has dealt with the delicate issue of state cigarette taxes, and Indian

consumers and sellers of cigarettes on several occasions, including the very recent Supreme Court case of Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., _____ U.S. _____, 114 S. Ct. 2028, (1994).

Beginning with Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976), the Court has steadfastly held that, although a state lacks the authority to tax cigarettes sold to tribal members for their own consumption, and that cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt, and therefore need not be stamped, the state can require an Indian tribal seller of cigarettes to collect the state cigarette tax from non-Indian purchasers, and can otherwise regulate the sale of cigarettes on Indian reservations. The Court in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) dealt specifically with Washington's cigarettes taxes, and tribal Indians. The Court held that (1) the State can impose its tax on non-Indian

purchasers of cigarettes sold by Indians, despite the fact that the tribe also imposes a tax on the cigarettes; (2) the State's record-keeping requirements regarding the Indian's tax exempt and non-exempt sales of cigarettes are valid; and (3) the State's interest in taxing Indian purchasers of cigarettes, who are not enrolled in the governing tribe outweighs any tribal interest that may exist in preventing the State from imposing such taxes. Finally, the Court addressed the issue of shipments of cigarettes traveling to a reservation in Washington from out-of-state wholesalers, which is very closely connected to the issue here: whether cigarettes obtained by an Indian from out-of-state distributors, and then transported, and possessed in Washington by that Indian purchaser, are required to bear a Washington State tax stamp prior to any retail sale.

The Court in Colville held that "although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure then the Tribes...have

refused to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. at 161-62 (emphasis added). Thus, the Court approved the civil remedies available to the State for non-compliance with the State's tax laws, while recognizing the Indians' right to possess untaxed cigarettes. The Court carefully distinguished that particular case as not involving on-reservation seizures, and found it unnecessary to resolve whether a state can enter onto a reservation to seize unstamped cigarettes intended for sale to non-tribal members. The date, the Court has not answered that question, and the State of Washington has previously stopped short of going onto the reservations to seize unstamped cigarettes, which is what the ATF agents did in these cases, as discussed infra.

More recently, the Court has reaffirmed and expended the states' authority to regulate sales of cigarettes from Indian smoke shops to non-Indian purchasers, including regulations limiting the quantity of unstamped, untaxed cigarettes

available to the Indians, based on probable demand. Oklahoma Tax Comm'n v. Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991); Milhelm Attea, supra, 114 S. Ct. 2028. However, in so doing, the Supreme Court continues to recognize the critical distinction between a state's right to tax cigarettes sold on a reservation to non-Indian purchasers and the Indians' right to possess unstamped, untaxed cigarettes meant for Indian consumption.

Washington law concerning cigarette taxes and Indians contains a nearly identical quantity control provision to that of New York upheld in Milhelm Attea, which, of course, was not a ;criminal case under the CCTA. WAC 458-20-192 provides that the resale of the tax exempt cigarettes may be made "only in such quantities as is approved in advance by the Department of Revenue." Therefore, Washington can and does control the quantity of unstamped cigarettes Indians may acquire from Washington distributors.

However, it is clear that Washington recognizes that it lacks the authority to tax cigarettes sold to tribal members for their own consumption, or cigarettes possessed by and Indian for sale to other tribal Indians. It is only when the cigarettes are sold to a non-tribal member that the cigarettes become taxable, as repeatedly emphasized by the Supreme Court. To ensure that non-exempt, non-Indian purchasers do not likewise escape taxation, the Washington regulations limit the quantity of untaxed cigarettes that Washington wholesalers may sell to tribes and tribal retailers on a probable demand basis. On-reservation cigarette sales to persons other than reservation Indians are legitimately subject to state taxation. Additionally, Indian cigarette vendors are not immune from state regulations regulating the quantity of, and the record-keeping requirements of, unstamped cigarettes they purchase in Washington. Wilhelm Attea, supra.

Therefore, Defendants' argument that Washington State law regulating the sale of cigarettes by tribal Indians is

somehow preempted by the Indians' federal immunity from state taxation must fail. This court does not hold that the State of Washington is unauthorized to regulate the on-reservation sales of cigarettes. To he contrary, it is clear that the applicable statutes and regulations in Washington fall within the parameters of the Supreme Court decisions. Washington validly imposes its cigarette taxes on any on-reservation sale to a non tribal member, and requires the tribal retailers to prepay the tax when they purchase cigarettes from a Washington distributor. However, the Indian retailer may also purchase unstamped cigarettes from a Washington distributor. When an Indian retailer purchases unstamped cigarettes for sale to other Indians from a Washington wholesaler, the State controls the quantity of authorized unstamped cigarettes available to Indians, using a "probable demand" quota system. Additionally, an Indian retailer of cigarettes in Washington is required to collect the State cigarette tax from non-Indian purchasers, and to keep

detailed sales records of exempt and non-exempt sales. However, an Indian retailer is not prohibited from obtaining unstamped cigarettes in or out of state.

The State of Washington is not without remedies if Indian tribal members are not in compliance with the State law. An Indian tribe's sovereign immunity prevents the State from suing the Tribe for the collection of unpaid State cigarettes taxes. Potawatomi, supra. However, the State has alternative remedies. Individual members, agents, or officers of a tribe may be liable for damages brought by the State for unpaid taxes. The State may also collect the tax from Washington cigarette wholesalers, may seize unauthorized, unstamped cigarettes headed from a Washington distributor to a reservation, or may assess a Washington distributor who supplies unauthorized unstamped cigarettes to a tribal retailer for the unpaid taxes. Id. Washington law provides that "[a]ny delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal vendor without advance

approval by the department will result in the treatment of those cigarettes as ""contraband" subject to seizure, and in addition, the person making...such delivery will be held liable for payment of the cigarette tax and penalties." WAC 458-20-192. This is to be distinguished from the definition of "contraband" under the federal criminal CCTA.

Additionally, RCW 82.24.040 provides that the Department of Revenue may "revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place..." RCW 82.24.120 provides that a person who is found to have failed to affix the required stamps, or to have them affixed as required by law can be assessed, in addition to any tax due, the greater of $10.00 per package of unstamped cigarettes, or $250.00 plus interest.

It is not disputed that the Indictments in this case are

based only on the contention that these Defendants obtained unstamped cigarettes from Montana distributors, transported the cigarettes across state lines into Washington, and possessed the cigarettes in Washington. This court has found that the Indictments in these cases do not state an offense, because Washington law does not prohibit an Indian from purchasing unstamped cigarettes from out-of-state distributors, transporting those cigarettes across state lines into Washington, and possessing them in Washington. Accordingly, IT IS HEREBY ORDERED that the Clerk shall **DISMISS THE INDICTMENTS** against Kurt Brigman, Terry Tonasket, John Cook and Joanne Cook **WITH PREJUDICE**.

IT IS FURTHER ORDERED that the jury trial set to commence on September 19, 1994 in these cases is **HEREBY VACATED**.

Nevertheless, the Washington Statutes and regulations clearly indicate an awareness that, although the Indians are

exempt from the state cigarette tax, and, thus, are allowed to possess cigarettes no bearing tax stamps for their own use, or for sale to other Indians, the State can and does regulate the on-reservation sale of cigarettes to non-Indians. This court finds that Washington's regulations regarding the taxation of cigarettes as applied to Indians are reasonable, and that the civil and regulatory remedies set forth in state law are available to the State if the Indians do not abide by those regulations.

**MOTION TO DISMISS**

The Motion to Dismiss the Indictments against these Defendants is brought pursuant to Fed. R. Crim. P. ;12(b)(2) for failure to state a federal offense. Rule 12(b) provides that "any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." This includes a motion challenging that the indictment does not state an offense pursuant to Rule 12(b)(2).

Rule 12(b) of the Federal Rules of Criminal Procedure permits consideration of any defense "which is capable of determination without the trial of the general issue." A motion to dismiss is generally "capable of determination" before trial "if it involves questions of law rather than fact." United States v. Nukida, 8 F. 3d 665, 669 (9th Cir. 1993); United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir.), cert. denied, 478 U.S. 1997 (1986). If the pretrial claims substantially founded upon and intertwined with evidence concerning the alleged offense, the motion falls within the province of the ultimate finder of fact, and must be deferred. Nukida, supra; United States v. Buckely, 689 F.2d 893 (9th Cir. 1982). cert. denied, 460 U.S. 1086. If, however, the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense raised, the defense issue is properly resolved before trial. Nukida, supra at 669.

Whether Indians are prohibited under Washington law

from receiving, transporting, and possessing unstamped cigarettes is clearly a question of law, totally distinguishable from the facts alleged in the Indictments. Whether these Defendants, in fact, did obtain unstamped cigarettes out of state, transport them into Washington, and possess them in Washington is not determinative of whether they are prohibited from doing so. Therefore, the court finds that the issue of whether the Indictments state an offense by these Defendants is appropriate for pre-trial resolution.

**MOTION TO SUPPRESS EVIDENCE AND RETURN PROCEEDS**

Because the court has found that the Indictments must be dismissed for failure to state a federal criminal offense, the Motion to Suppress Evidence would appear to be moot. However, because the Washington Department of Revenue is in possession of the proceeds of the sale of cigarettes seized in the subject searches, and has been directed by court Order to retain those proceeds until further Order of the court, this

court finds it appropriate to also resolve the suppression issue.

Defendants contend that the search warrants authorizing the searches of the Indian smoke shops were overly broad, and that the supporting affidavit was invalid because it incorrectly stated Washington Law regarding the right of Indians to possess unstamped, untaxed cigarettes. This court agrees.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects." U.S. Const. Amend. IV. No warrants may issue except those which particularly describe the persons and things to be seized. Id. "Fear of general warrants and if indiscriminate rummaging among personal belongings motivated the adoption of the Fourth Amendment." Payton v. New York, 445 U.S. 573, 583 (1980). "Only a warrant particularly describing the place to be searched and the persons or things to be seized is valid." United States v.

McLaughlin, 851 F.2d 283, 285 (9th Cir. 1988).

It is not disputed that the warrants here are sufficiently specific as to the places to be searched. Rather, the Defendants contend that the search warrants authorizing the searches were impermissibly broad, in that they did not differentiate between contraband and legally possessed unstamped cigarettes.

The warrants here authorize, inter alia, the seizure of "cigarettes or tobacco products constituting contraband under State law and all packaging." The affidavit sets forth the Agent's expertise and experience in contraband cigarette investigations, and the circumstances leading the affiant to believe that evidence of contraband cigarettes would be found on the premises of the smoke shops. The affidavit is incorporated by reference into the search warrant.

The affidavit further sets forth the officer's version of what the Washington State law is regarding contraband cigarettes. It is not totally accurate. The affidavit states:

Under Washington State law allocated cigarettes supplied to Indian tribe are stamped with the authorized official Washington State tax stamp and are considered stamped untaxed allocated cigarettes. This allocation works as follows:

Each tribal reservation receives an annual allocation limiting the quantity of cigarettes that can be purchased untaxed. The allocation is based on Tribal Service Area population and national average annual cigarette consumption rates.

Cigarettes may only be purchased from Washington licensed wholesalers. All cigarettes sold to customers in Washington are required to be stamped whether they are intended to be taxed or exempt.

Wholesalers must obtain approval from the Department of Revenue prior to each shipment. Approval is granted only up to allocation levels.

The wholesaler ships stamped cigarettes after receiving approval and is allowed a refund by the Department of Revenue for these tax exempt sales.

The allocation system has been circumvented by certain smoke shop operators who purchase untaxed cigarettes out of state and smuggle them across the border. Compliance checks by the Washington

> Department of Revenue have repeatedly found unstamped cigarettes for sale in a number of smoke shops, demonstrating that the system is being circumvented.

The warrants authorize the search and seizure of "contraband cigarettes under state law." The affidavit gives the impression that under Washington law all unstamped cigarettes found in an Indian smoke shop are "contraband", which is a misleading representation of the applicable law, as discussed supra. The Department of Revenue may have instituted a policy of stamping the allocated tax-exempt cigarettes for Indian consumption, along with the taxed cigarettes, but there is not such provision in Washington law. Washington law requires Washington cigarette wholesalers, retailers, and others to affix tax stamps on cigarettes for sale to non-Indians. They have a reasonable time (72 hours) after receipt to do so. WAC 458-20-186.

However, Washington statutes and regulations are replete with provisions that cigarettes in the possession of a

tribal Indian for Indian consumption are not required to bear the tax stamps. WAC 458-20-192 clearly provides that Indians may purchase unstamped cigarettes for resale to "qualified purchasers." Therefore, if some of the unstamped cigarettes seized in these searches were intended for Indian consumption, or were received within the past 72 hours, and not yet transferred to a non-Indian consumer, no tax stamps were required to evidence payment of tax.

The Fourth Amendment prohibits general searches. Nothing may be left to the discretion of the officer executing the warrant. "Under the Fourth Amendment, a warrant must particularly describe the items to be seized, and nothing may be left to the discretion of the executing officer." United States v. Crozier, 777 F.2d 1376, 1381 (1985).

"The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved." United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). So long as officers can distinguish

between legally and illegally possessed property on the basis of objective, articulated standards, a search warrant based on probable cause may direct inspection of premises containing a generic class of items, a portion of which are believed to be contraband. United States v. Pollack, 726 F.2d 1456, 1466 (9th Cir. 1984). If such standards reasonably guide the officers in avoiding the seizure of protected property, a search warrant authorizing such seizure is not a general warrant. Id. However, a search is unlawfully general where the warrant contains no guidelines distinguishing between property which was contraband and that which was not. United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977) cert denied, 436 U.S. 904 (1978).

In determining whether a description is sufficiently precise, the Ninth Circuit has looked at the following factors: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the

warrant sets out objective standards by which executing officers can differentiate items to be subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. Spilotro, supra 800 F.2d at 963.

Here, there was probable cause to believe that these Defendants had possession of unstamped cigarettes obtained in Montana. However, there was no probable cause to seize all unstamped cigarettes found in the Indian smoke shops. Neither the warrant nor the affidavit set forth objective standards by which the officers could differentiate cigarettes that should have been stamped from those that required no such stamp. Finally, the government agents would not have been able to describe the items more particularly in light of the fact that the only information available to them regarding the applicable law was undoubtedly what was erroneously described in the affidavit.

The search warrants and supporting affidavit in these cases are identical except for the name and location of the property to be searched. The warrants authorize the search for, and seizure of "contraband cigarettes under state law." The supporting affidavit implies that under Washington law, all unstamped cigarettes in the possession of anyone, including Indians, at any time, in the State of Washington are contraband. This statement is an incorrect statement of the law as it relates to Indians, as discussed supra.

The affidavit of Gary O'Neil, Assistant Director for Special Programs for the Washington State Department of Revenue states:

> Until recently untaxed cigarettes which were allowed for delivery to the reservations pursuant to the Department's allocation system bore no tax stamps. However, it has not been possible for the Department of Revenue, in monitoring cigarette stocks in retail outlets through visual observation, to determine which unstamped cigarettes were obtained through the allocation process and which were acquired without advance notice. The Department of Revenue has therefore required

> all cigarettes untaxed and taxed to bear the state excise tax stamp. Indian retailers are not required to pay the tax represented by the stamp with respect to purchases made through the allocation system.

The court can sympathize with the difficulty facing the Washington Department of Revenue in enforcing the State cigarette tax laws regarding Indian smoke shop sales or any other sales. However, notwithstanding the unwritten policy of the Department of Revenue, there is no authority either in the RCW of WAC forbidding Indians from possessing unstamped cigarettes. Rather, the statutes and regulations clearly provide that tribal Indians can purchase, possess, consume, and sell unstamped cigarettes to other Indians.

Nevertheless, as stated supra, the State of Washington has ample civil and regulatory authority by which it can enforce the collection of taxes on cigarette sales by Indians to non-Indians.

These Defendants are enrolled members of a

recognized Indian tribe, who own and/or operate smoke shops located on the Colville Indian reservation, which were searched by ATF agents on November 22, 1991. It is undisputed that the Defendants are licensed by the tribal government to sell cigarettes.

On November 22, 1991, Magistrate Judge Imbrogno issued search warrants to search the Defendants' smoke shops. The warrants were among 12 identical warrants authorizing simultaneous searches. The Magistrate Judge was not informed that the premises to be searched were locate on an Indian reservation, and were owned by enrolled members of an Indian tribe. More importantly, she was not correctly advised about Washington law relating to cigarette taxation and Indians. All unstamped cigarettes found in the smoke shops were seized.

ATF Agent Herb Byerly's affidavit supporting the warrant set forth the background of the investigation, clearly establishing probable cause that these Defendants obtained

unstamped cigarettes in Montana, transported them to Washington, and were in possession of the unstamped cigarettes in Washington. Even if that were a federal crime, which this court has found it is not, the executing officers might have found unstamped cigarettes in the Indian smoke shops that were legally obtained and possessed. Therefore, the court is satisfied that the search warrants were overbroad in that they did not give officers any clue that they might find unstamped cigarettes in the Indian smoke shops that were perfectly legal.

The warrants called for the seizure of "cigarettes or tobacco products constituting contraband under state law and all packaging." The affidavit in support of the warrant set forth Washington law regarding cigarettes, but did not accurately reflect the law regarding the Indians exemption to state taxation. The affidavit also did not specify that the premises to be searched were located on an Indian reservation, or that the owners were enrolled members of an

Indian tribe. Therefore, the court finds that the subject search warrants and supporting affidavit were overbroad and facially invalid. Accordingly, Defendants' Motion to Suppress Evidence obtained as a result of the searches is GRANTED.

A great number of cigarettes were seized during the searches of the Indian smoke shops. Magistrate Judge Imbrogno subsequently signed an Order authorizing the Government to turn the cigarettes over to the Washington Department of Revenue, and directed the Department of Revenue to timely market the cigarettes and retain the proceeds until further order of the court.

Because the proceeds from the sale of the cigarettes seized as the result of an invalid search are fruit of the poisonous tree, IT IS HEREBY ORDERED that the Washington Department of Revenue is directed to forthwith return the proceeds of the cigarette sales to the owner of the smoke shops that were illegally searched.

IT IS SO ORDERED. The Clerk is directed to enter this Opinion and Order and forward copies to counsel.

DATED this 19th day of September, 1994.

JUSTIN L. QUACKENBUSH
CHIEF UNITED STATES DISTRICT JUDGE

## APPENDIX C

THE COURT: This is United Sates versus Gord, Cause No. 94-5257. The matter is set for trial today. We have a jury waiting, but before we get to that, there are a number of matters that we must address.

I have a whole bunch of stuff here that is recent, filed just this last week. There are a lot of motions that have to do with the conduct of the trial, but perhaps the most important matter is the renewed motion to dismiss the indictment. This followed a ruling by Judge Quackenbush in the eastern district on the 19th of September, and I have now read Judge Quackenbush's opinion twice. As counsel is aware, in a similar case, similar in some ways, United States v. Bill Flores, No. 93-2179, I ruled orally,coming to a conclusion different than Judge Quackenbush. There are a number of things that have happened since that ruling and I am aware that I rubber stamped my earlier ruling in the

Flores case in this case when I first ruled on the motion to dismiss.

There are some things that have occurred since that first ruling in the Flores case on the motion to dismiss, one of which was the difficulty we had with jury instructions and the acquittal, and, of course, Judge Quackenbush's opinion. So I want to revisit that motion to determine whether my initial ruling was correct of whether Judge Quackenbush is correct, and then go on from there, because it seems to me that even in light of the fact that the facts were somewhat different here than with Judge Quackenbush in a couple of particulars, those are important considerations.

Now, there are two things in Judge Quackenbush's opinion that I wanted to ask about.

One is a statement on page 8 of that opinion that "It is not disputed that the Indian smoke shops in this case are Indian tribal organizations."

That question, what was an Indian tribal organization,

was in great disputes in the Flores case. I don't know what the smoke shops were in the eastern district case, and I don't know what the smoke shop in issue in this case is, but I do know that the smoke shops involved in the Flores case generated a lot of discussion and exhibits, and so forth, as to whether they were Indian tribal organizations.

So, I guess, Mr. McLean, my question is to you, as to whether this --well, whether the smoke shop in this case is an Indian tribal organization and what is the difference between this one and the ones in the eastern district on the Colville Reservation.

MR. MCLEAN: Your Honor, I was surprised to see in Judge Quackenbush's order that the status of those tribal smoke shops in eastern Washington was not disputed. It was never discussed, to tell you the truth. We never addressed the issue of whether the government would agree they were Indian tribal organizations or not. I can tell you in this case that the government's position is consistent with that in

Flores, that the Thunderbird Trading Post is not an Indian tribal organization by virtue of a license issued by the Puyallup tribe.

I would also reiterate --

THE COURT: This smoke shop is licensed, as was the ones in Flores? Is that the relationship with the tribe?

MR. MCLEAN: I think the defendants will muster some evidence to that effect, Your Honor. I'm not willing to concede that at this point because I haven't seen it myself, but I would not be surprised.

THE COURT: Go ahead.

MR. MCLEAN: Even if, as in Flores, or in this case, this court were to determine from a legal standpoint that the tribal license granted the status of an Indian tribal organization to the Thunderbird Trading Post, that status still requires that the tribal organization receive prior approval from the Department of Revenue for receiving unstamped

cigarettes. The evidence in this case will be that there hasn't been one prior approval requested by the Puyallup Nation in at least the last ten years for cigarettes coming onto the reservation, and that there was no prior approval specifically to the Thunderbird Trading Post.

The prior approval, as I have explained to the court, is the process which the state has determined necessary for this off-reservation enforcement that they attempt to do, and that is apply the cigarettes to tax stamps at the wholesaler. They require the prior approval so that they know the cigarettes are coming in and so they can require the tax stamps to be applied to each package. Then, of course, that allows law enforcement and the state of Washington to determine if the cigarettes in each store are contraband or not.

THE COURT: My next question about this is the question of whether the fact that Mr. Gord is not an enrolled tribal member makes any difference here. The

showing made by the defense is that he was at all times acting on behalf of enrolled tribal members, as I understand.

MR. MCLEAN: As I told this court before, it is the government's position that the race of the particular defendant is irrelevant to the court's determination. Everyone must go through this allocation process pertaining to the tax of the cigarettes onto the Indian reservation.

THE COURT: Let me put it another way.

Does he have -- in terms of the right to possess unstamped cigarettes, if there is one, does he have a different status than an enrolled member of the tribe in view of the fact, if it is a fact, that he is an agent of an enrolled member?

MR. MCLEAN: It's the government's position that his status would be different, if the court finds that distinction necessary to be made. He is not a tribal member and therefore cannot possess unstamped cigarettes or arrange for their shipment into the state of Washington.

I don't think we should lose sight of that allegation,

as well. These people are charged with conspiring with the Montana wholesalers to bring these cigarettes into Washington. And Montana wholesalers certainly have not received any prior approval from the Department of Revenue to ship cigarettes.

THE COURT: Wait a minute. Wait a minute. I'm not sure we're talking about the same thing. I'm just focusing on this question of whether -- maybe I should put it this way:

Do you concede that whatever he did was done on behalf of an enrolled tribal member?

MR. MCLEAN: No.

THE COURT: Okay.

Do you have evidence that he was acting on his own?

MR. MCLEAN: We have evidence that he was the general manager of the Thunderbird, directed the day-to-day activities. He was married to Vicky Gord, the enrolled member who had the license and owned the real

estate at the Thunderbird Trading Post. She was the owner and did receive funds from the proceeds of these sales. But it's our position that we didn't have enough evidence to indict Ms. Gord -- we still don't have enough evidence -- and that Ted Gord was the leader of this enterprise and is properly before the court charged with crimes.

THE COURT: I may be putting this awkwardly and not very carefully, but if Ms. Gord could do what was done, does that shield Mr. Gord?

MR. MCLEAN: I can tell you, I don't want the government to be in the position of having to prove that distinction at trial, Your Honor. It's our position that there is no shield. But the theory of our case is that it doesn't matter.

THE COURT: Let me try it again.

Does your case as to Mr. Gord rise or fall on the legality or illegality of what Indian tribes may do or enrolled members may do?

I mean, clearly, if he was acting on behalf of himself, you've got a different situation. So I guess what I'm asking you is whether you have any evidence that he was acting on behalf of himself as opposed to on behalf of his employer?

MR. MCLEAN: We have evidence that he was benefiting personally in addition to his salary, if that's what may prove that point.

THE COURT: What's the nature of that evidence?

MR. MCLEAN: We have documentation that the defendant was receiving $500 cash per day into an envelope marked "Ted" which was to be put into a trust account for some reason. This cash was paid to Mr. Gord outside the course of his normal salary. The salary was also paid to a company called Gordco Investments at the rate of $3,000 a week. Mr. Gord also benefited in the payment of some of the real estate taxes that were due on the Thunderbird Trading Post which were owed by his wife

Vicky. He also benefited, of course, by simply maintaining this position as the general manager and the salary of $3,000 a month -- or $6,000 a month.

THE COURT: Mr. Morales, I guess I should ask for any oral argument you may wish to make in regard to your motion.

MR. MORALES: Thank you, Your Honor.

I wish to address the questions presented by the court and point out with regards to the first question as to the status of this particular shop. The status of the shop in the case at bar, that shop being the Thunderbird Trading Post, is unquestionably a shop that sits on land that is in trust for a member of the tribe, so it is owned by her. I've got the file record attached to my most recent affidavit as proof of that fact.

THE COURT: Is this within the Puyallup Reservation boundaries?

MR. MORALES: That is correct, Your

Honor, It's right on the edge, but it is within the exterior boundaries of the reservation.

It is also licensed only by the tribe. It cannot be licensed by the state as far as the retail sales are concerned.

It has been approved by the tribe based on its business codes and licensing requirements. It has complied year in, year out, in fact every month, with the requirements to pay the tribal excise tax. We have plenty of evidence to present to the court on that. So, because of that, I believe that it is such an organization as the court, perhaps, had in mind in the Eastern District of Washington. It discusses an Indian tribal organization.

I would point out, also, the statutes and the regulations don't talk about the Indian tribes. It talks about Indian tribal organizations, and I submit there is a distinction there, and I would submit that because of that, the status of a business that is so owned and so licensed and recorded, and so forth, by the tribe must be what is intended by a "tribal

organization" as opposed to just the tribe itself.

If I could then address the second question.

THE COURT: In the Flores case, I let that issue go to the jury, basically, because it was much in contest as to what an Indian tribal organization was, whether it was the tribe itself, or whether it was a business like this.

There was an acquittal in that case, which tells us only that we don't know what the jury based that decision on, whether they determined that that was a tribal organization and therefore in some way exempt, or whether that was not a part of their decision.

MR. MORALES: We have to bear in mind on that point, Your Honor, the fact that it makes no difference whether it is the tribe or a tribal organization or an individual tribal member who has a cigarette and smokes it on the reservation, as far as the tax exemption. Any and all of those, I submit, enjoy the exemption based on federal law and treaty rights, the status as a native American Indian.

The state of Washington, by trying to impose all these reams of statutes and regulations and policy declarations, and so forth, by the Department of Revenue is attempting to blur that and limit it only to a so-called tribal organization. Doing that does not take away the right of the individual Indian member to both possess and smoke those cigarettes, nor certainly does the right of the tribal council itself. So I don't think that we need to spend that much time on that point.

I'm very much aware of the situation regarding the Flores case because I spent a considerable amount of time with Mr. Hoovestal, who represented Mr. Flores, in preparation of this case. But I don't think the court should lose track of that point, that we are dealing with a federal exemption and we are prosecuting under a federal statute which must be interpreted hand in hand with that federal exemption. The CCTA talks in terms of tax stamps, where there's a tax due. I would once again submit to the court that

there can be no prosecution if in fact we have facts that the taxable cigarettes will be kept in one pile, the non-taxable cigarettes will be kept in a separate pile. I don't think you could bring a CCTA prosecution on cigarettes that are clearly going to be used on a tax exempt basis. It is the fact that they are all mixed together that we have this problem.

But I do think that regardless of the language of the statute, we have to impute or we have to recognize that the exemption is not granted and is not controlled by the state of Washington. The exemption comes from somewhere else, and that is clearly preempted. There is no question about that, as far as the right of possession. As far as what the state can do about it is a different story because we have case law that says they can seize it.

But I don't want to get too bogged down on that point. I do think that we have, according to Judge Quackenbush's decision, we do have that tribal organization. Indian tribal organization.

In regards to the second question that you addressed to Kris McLean, I can say a number of things. It seems to me that although we are talking about in this case a slightly different fact structure than some of the cases in the eastern district, I am not -- I'm not convinced, Your Honor, that all of those shops did not have the issue of agency like we have here. I believe the issue of agency, as a matter of fact, existed in the Flores case. I believe that some of the defendants in the Eastern District of Washington also were nothing more than managers of shops owned by enrolled members.

And Kris can correct me if I'm wrong. I believe that I'm correct there.

And so we have to then address what possibly could the legislature in the state of Washington have intended and what is the position of the government here in this case. Did the legislature, the administrative agency that enforce these statutes, have the government in this particular case ask the

court to adopt a policy or interpret a policy that these tribal organizations, that these shops cannot employ other than enrolled members of the tribe? I submit not. I cannot in any way, shape or form, imagine the legislature sitting, thinking, "We're going to allow only the enrolled members to possess these cigarettes, and we're not going to allow any of their managers, assistant managers, employees, truck drivers, errand boys, whatever -- secretaries, even -- be non-Indian.

I don't think that's the case, and I think that that would be against public policy an any state.

THE COURT: What happens if, as Mr. McLean thinks, Mr. Gord was in fact in some way an owner of this enterprise?

MR. MORALES: That's a different issue. That is a different issue, or sub issue. I would indulge the court's patience for a second.

I think that if in fact, obviously, he is conducting his own separate business, as it were, whether it be through a

totally different set of books or through benefiting outside of the scope of his employment as a manager, outside of the agency relationship, that's a different issue. But I can address that, also, very simply.

One of the things that Mr. McLean points out in regards to that, the evidence, we do have a factual issue regarding this so-called envelope, the so-called $500-per-day envelope that has these listings. Kris and I spent some time talking about that back in his office in Helena last week -- or two weeks ago. I forget; time's going by.

That's one item of evidence that he is offering to the court in oral argument. We very strongly dispute that, and we will prove it had nothing to do with it. And we have -- we're prepared to bring the accountant and everybody, the bookkeeper, the CPAs, anybody that needs to be brought into court to explain that.

Now, of course, this is a factual issue, so I'm not sure as to what extent we can discuss it now. Being that it is a

jury trial, I suppose we can talk about it freely before the court. But we're prepared to prove that my client was not benefiting from that. So we dispute that very strongly.

Another item that my opponent brought up in an attempt to show that my client was benefiting outside of the scope of that agency relationship with the owner of the Thunderbird was, for example, that the owner of the shop was making payments on that property, which belonged to her, and that he, being her husband, was benefiting by those payments.

Two things:

First, I guess I'm not sure how that benefit would be imputed in that situation. If it means that somehow when the Thunderbird is sold he will get money out of that, I don't see how that's the case. There's no evidence to that. Does that mean that he's going to get a pay raise because of that? Not even that. It just totally escapes me how that relationship proves that point.

But more so, the second thing on that point is that it would seem that the government is asking the court to adopt a policy that then perhaps the tribal member should not marry somebody outside the tribe. Because then, in addition to the same argument that I was talking about with regards to employees not being tribal members, that also, by virtue by matrimony to a nontribal member, that spouse is going to be imputed with ownership, possession, transfer, whatever, of those cigarettes. Whether it be -- they are trying to say just because of the fact that he's married to her he's benefiting because she's making payments on the property. I don't think that's the policy of this state, and I don't think the United States would recognize that as being a policy.

The last brief point with regards to the matters that Your Honor brought up with opposing counsel, when you are talking about Vicky Gord, who is still legally married to my client, there's no two ways about it, she is a tribal member, and she is the sole owner. And I know the court had some

difficulty in conveying the point of your question to Mr. McLean, but there is simply absolutely no agency issue there. Whether or not they have sufficient evidence to indict her or not, really, I don't see how that affects this particular case in terms of the question asked by the court.

So I'm not sure if you're saying that the court's question with regard to agency is moot because she is also, in quotes, an unindicted coconspirator? I believe I interpreted Your Honor's question as, even assuming that she was a coconspirator, that the agency issue still stands, and the issue is that she would have been in the same situation as the defendants before Judge Quackenbush in the eastern district. And that's why her status won't change this thing much.

Maybe the best thing to do at this point is to just see if the court has any further questions instead of my just going on and explaining everything else.

THE COURT: I don't think so, Mr. Morales.

Mr. McLean, response?

MR. MCLEAN: Your Honor, if I'm listening to Mr. Morales' argument, I would like to just tell the court that Vicky Gord is not allowed to bring cigarettes from Montana into Washington without the tax stamps on them. Rule 192, which is cited in Judge Quackenbush's ruling, states that Indian and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors. The government will show that the Clinkenbeards were not licensed. Further, they can only purchase these cigarettes for resale to qualified purchasers. And that is, of course, other Indian persons on the reservation.

So, Ms. Gord, as the Indian person, is not allowed to bring the cigarettes in from the Clinkenbeards, as we have alleged in this case, and they can only be purchased through licensed wholesalers for resale to the Indian persons on the reservation. Every cashier that we are going to call at this trial will say that "We sold to anyone that walked in the door," and the proof is going to be that the cigarettes were

not for sale only to the native American population. In fact, the vast majority went to the non-Indian larger market from the Tacoma area.

Quoting from Rule 192, is really the crux --

THE COURT: Are you talking about the Administrative Code?

MR. MCLEAN: Yes, Your Honor.

THE COURT: Yeah.

MR. MCLEAN: It also contains the prior approval provision as well. And Vicky Gord, or any other Indian person, must comply with this law as well, as the court has previously ruled pursuant to Colville.

I think that gets back to the court's question to me, does the government's case rise or fall on whether an Indian person can engage in this conduct, and our response at this time is the defendant -- no, the government has charged in the indictment, and will prove at trial, an Indian person cannot do this. That's why I always stand before the court

and say it does not matter the race of the defendant. The facts of this case, that prior approval requirement and the requirement that they purchase from licensed wholesalers, Indian people cannot engage in the conduct that is charged in the indictment or that we will prove at trial.

I have nothing further, Your Honor.

THE COURT: Okay.

I want to see, in the first instance here, if I have any other questions for you.

I want to take a little more time with this, counsel.

MR. MORALES: Your Honor, may I address the court just very briefly?

THE COURT: Yes.

MR. MORALES: Just one point in rebutting what Mr. McLean just said.

He points out one specific Administrative Code provision, as Judge Quackenbush did in his decision. He said very clearly on pages 6, 7, 8, and 9, he goes through

each of these statutes with a fine-tooth comb, through the regulations, and says there is a difference as of 1988 between what the statutes and regulations say and what the policy of the state has been in some of these matters. And so just picking one that says -- that would seem to say that Vicky Gord, as an Indian, cannot do these things doesn't prove the case because there are other laws that we have to look at. so we have to look at the whole picture and see if her right really exists based on the overall picture, not just on that one statement.

Thank you.

THE COURT: Give me a few more minutes, counsel.

(Recess.)

THE COURT: What we are looking at here, of course, is the renewed motion to dismiss, which is in part a motion for reconsideration.

I have tried to look at this afresh in light of the ruling

of Judge Quackenbush and also in light of my prior rulings. It is impossible to look at this without the events of the Flores trial being -- or at least being aware of those things.

To make a long story short, I agree with Judge Quackenbush. That does not necessarily equal a dismissal in this case. But I think his analysis is correct.

Besides what he has said in his opinion, there is another reason for that. Under the so-called rule of lenity, confusion goes to the defendant, and these statutes and Administrative Code provisions, that is the state statutes and Administrative Code provisions, must be interpreted, if there is room for interpretation, in the manner most -- well, I'm not sure that it's correct to say in the manner most compatible with the defendant's position -- but we must adopt the more lenient construction, if there is a real question.

On trying to analyze the state's tax scheme as applied to Indians and as applied to cigarettes, it is a reasonable construction of that statue to conclude that it is not illegal for

an Indian tribally-licensed smoke shop, owned by an enrolled member of the tribe on a reservation, for such a person or entity to possess unstamped cigarettes. The statutes indicate that it is legal under some circumstances for them to own unstamped and possess unstamped cigarettes, and what's clear to me is that the Washington scheme, the statutes and the Administrative Code, when read together, are simply not sufficiently clear upon which to base a federal prosecution. They are not sufficiently clear to permit a finding that unstamped cigarettes in possession of a tribally-licensed smoke shop owned by an enrolled member on a reservation are contraband. That holds true whether the possession is direct or constructive, whether the possession is in transit or on the site of the smoke shop. It may be -- well, I just think the Washington statutes are not sufficiently clear upon which to base a federal finding that those cigarettes would be contraband as defined by federal law.

The latest case that talked about that rule of

construction I have referred to is U.S. v. Aguilar in 21 F.3d 1475. It also referred to that in U.S. v. Arzate-Nunez in 18 F.3d 730. Those cases follow a couple of Federal Supreme Court cases, 112 S.Ct. 2102, U.S. v. Thompson; and 112 S.Ct. 1329, U.S. v. R.L.C.

I had a different view of this, and in particular a different view of the language referring to tribal organizations, before we submitted the Flores case to the jury. But that language, among other language, makes it clear to me that at least these statutes and Administrative Code provisions are susceptible to different interpretations. It is the fact, in part, at least, that those different interpretations have been seized on by the Indian tribes which has led, in this state, to this series of prosecutions.

Now, that doesn't entirely answer the question in this case, because there apparently is a question as to Mr. Gord's status in regard to these particular cigarettes and this particular smoke shop. If he is an agent or employee and

acted as such totally during the events charged in the indictment, there's no offense. On the other hand, if he was an owner or was acting for himself and attempting to use this Indian tribal exemption or exception for his own benefit, he would not be entitled to that defense. It seems to me that this prosecution is really must be based on the question of Mr. Gord's relationship to these cigarettes and to this smoke shop. If he was acting on his own behalf, it's not an Indian case at all, and the Indian law had nothing to do with it. If he was not acting on his own behalf, and the subject cigarettes and transactions really were done on behalf of the Thunderbird Smoke shop, I think he is probably shielded.

Therefore, I have not directly ruled on the motion to dismiss at this point because I am not sure where that conclusion will leave you, but it is abundantly clear to me that one cannot be found guilty of conspiring to do something that is legal, or at least is not criminal, and if it is a possession of unstamped cigarettes owned by the

Thunderbird Smoke Shop that is the heart of the conspiracy charge, the conspiracy charge would fail. On the other hand, if he conspired with Indians for his own personal account as opposed to an Indian account, then you may have viable conspiracy charge.

I don't know where this brief opinion leaves you, but I think I should stop there. That tells you what I anticipate or how I would anticipate ruling on the motion to dismiss, but I hesitate to make any definitive rulings on that until you have considered what I have said and determined what is still alive here and what case you can make out of it, under the indictment as filed.

If there is a bad guy -- that's not a very good way to put this.

If there is an error in this whole scenario, it was created by the state's poor law and poor Administrative Code. As counsel for the government knows, I struggled and struggled with that issue in the Flores case, as to what the

state law really meant as applied to Indian tribes, and was not really able to determine what it meant and submitted the whole legal scheme to the jury. It should not be difficult, in light of the long history now of Indian cigarette cases and tax cases, to figure out a scheme that would be clear and would pass all muster. But in my judgement, the state has not done that yet, and it leaves us in this position where a federal prosecution based on state law simply cannot go forward on a state law basis in regard to the taxing of cigarettes to Indian tribal organizations.

I know you will want to discuss this. I'm mindful of the hour. It is now 11:30. I suppose what makes sense is for me to excuse the jury at this time until 1:30, or do you need less time than that?

MR. MCLEAN: Your Honor, I would like to have more than two hours to consider the court's ruling in light of the government's evidence in this case. I don't know if the court could excuse the jury for a longer time, or

perhaps have them come back tomorrow morning, but this case is just too large at this point to make a decision this large in a very short period of time. I would like the court's consideration in what I've got to do at this point, and give me a little bit more time, if at all possible.

THE COURT: I wish we had had all this information before us earlier and addressed this earlier. But I think Judge Quackenbush kicked it off on the 19th of September and required the reanalysis.

I'm reluctant to do that to a jury.

I guess my inclination is to excuse them until 1:30 and then ask you to report to me at 1:30 where you are and how much more time you need, and at that time I will determine whether to send them home until tomorrow morning or do something else.

Is that fair?

MR. MCLEAN: Thank you, Judge.

THE COURT: Let's meet here at 1:30, and

you can tell me where you are.

(Recessed at 11:34 a.m.)

AFTERNOON SESSION

(1:38 p.m.)

THE COURT: Mr. McLean, I guess before we broke you asked for a day, and I asked for a report at this time.

MR. MCLEAN: I appreciate the court's time, Your Honor.

Over the lunch hour I have been able to talk this over with the ATF agents that have worked the last four years on this case, and we racked through our evidence.

In light of the court's legal ruling this morning, it appears at this time that the government cannot proceed to trial, given the court's ruling. I don't want to make a motion to dismiss because I would like to preserve whatever appeal rights that I have, because we do intend to, hopefully, lump this in with the other cases on appeal.

So whatever the court's pleasure is in that regard.

THE COURT: It certainly is an appealable issue.

Let me -- where did I put it?

Let me look at the indictment.

Mr. Morales, do you have any comment on this?

MR. MORALES: If it pleases the court, I'm comfortable with the decision of my opponent not to proceed with the trial.

Insofar as how it should be handled at this point, of course, I would move to dismiss, and I would prefer that it be dismissed by order of the court without the -- with or without the consent of the government in this particular case.

That's all that I would request.

THE COURT: Obviously, the problem with this is the effect of a dismissal and just what it means.

In light of what I said this morning, depending upon the government's proof on relationship of Mr. Gord to this

smoke shop, it could be that there would be a separate indictment based on other facts, but the same conduct. But the government in this case has apparently put its eggs in the basket of the Washington cigarette tax scheme as it applies or does not apply to Indians and Indian tribal organization. If that is the point, based on my earlier ruling, should be dismissed. Obviously, dismissal is based on that and not on anything else that might be covered by or that might be an offense under a different approach.

But it's my judgment, based on what you've said at this time, for the reasons stated by this court earlier today and by Judge Quackenbush in his opinion, that the charges should be dismissed on the defendant's motion. We will let the Court of Appeals determine whatever they wish to determine, and we will let the government also determine whether an offense separate and apart from the way it was charged in this case was committed.

In light of my view of the law at this point, I don't

think I have much choice except to follow through in that fashion.

So my judgment is that the charges in the indictment should be dismissed on the grounds stated, and the defendant should be discharged.

## APPENDIX D

Before the court are the motions to dismiss filed by Defendants Stan Feist, Larry Clinkenbeard, Dorothy Clinkenbeard, Clint Rice, Lee Clinkenbeard, Jason Clinkenbeard, Ralph Hale, Clifford Brigman, Kenneth Baker, Deborah Boyes, and Wayne Boyes.

Defendants Clint Rice, Lee Clinkenbeard, Jason Clinkenbeard, Kenneth Baker, Tom Ryan, Deborah Boyes, and Wayne Boyes have also moved the court to allow them to join one or more of these motions. The court has carefully reviewed the parties' briefs and is prepared to rule. In the context of a motion to dismiss under Fed.R.Crim.P. Rule 12(b) (2), the court accepts all allegations of material fact as true. See e.g., United States v. General Dynamics Corp., 644 F. Supp. 1497, 1499 (C.D. Cal. 1986). "A pretrial motion is generally 'capable of determination' before trial if it involves questions of law rather than fact." United States

v. Shortt Accountancy Corp., 786 F. 2d 1448, 1452 (9th Cir. 1986). The Defendants have raised numerous issues of law in their motions to dismiss, and the court finds these motions to be appropriate for decision before trial. It remains to be seen, however, whether the government will be able to prove the factual allegations at trial.

## II. BACKGROUND FACTS AND THE GOVERNMENT'S ALLEGATIONS.

Three State of Washington residents are defendants in this case: Kenneth Baker, Ralph Hale, and Clifford Brigman. Defendant Kenneth Baker is the operator and manager of The Shoppe, a smoke shop and convenience store located in Puyallup, Washington. Defendant Ralph Hale is the operator and manager of the Indian Trading Post, a smoke shop located in Tacoma, Washington. Defendant Clifford Brigman co-owns Kaw-Li-Ja's, a smoke shop located if Ford, Washington.

Nine state of Montana residents also appear in this

matter. Defendant Stan Feist owns Feist and Watson Enterprises, Inc., d/b/a Sheehan Majestic, a Montana corporation whose principal business is wholesale sales of cigarettes, candy and specialty foods. Defendant Dorothy Clinkenbeard owns Joe's Smoke Ring, a gas station, convenience store, and casino located at Evaro, Montana, on the Flathead Reservation; Defendants Dorothy Clinkenbeard and Larry Clinkenbeard are co-owners of the Busted Ass Ranch near Arlee, Montana. Defendants Clint Rice, Lee Clinkenbeard, Jason Clinkenbeard, Wayne Boyes, Deborah Boyes, and Tom Ryan, all work for Defendants Larry and Dorothy Boyes, and Tom Ryan, all work for Defendants Larry and Dorothy Clinkenbeard.

The government alleges that from about mind-1982 to November 24, 1991, Defendants Stan Feist, larry Clinkenbeard, Dorothy Clinkenbeard, Ralph Hale, Kenneth Baker, and others formed an enterprise, the purpose of which was to smuggle contraband cigarettes from Montana to

Washington. In 1991, the government subjected the alleged enterprise to surveillance and as a result alleges the facts which follow.

On January 29, 1991, Tom Ryan, an employee of Dorothy Clinkenbeard, drove a vehicle loaded with cigarettes from the Busted Ass Ranch, Arlee, Montana, to St. Regis, Montana. There, Defendant Ryan met unindicted co-conspirator Ken Waltman, who had driven a vehicle to St. Regis, Montana, from Puyallup, Washington. Defendant Ryan and Ken Waltman exchanged their vehicles in St. Regis, Montana. Ken Waltman drove Ryan's vehicle loaded with cigarettes from St. Regis, Montana to The Shoppe, Puyallup, Washington. Tom Ryan drove a vehicle from St. Regis, Montana to the Busted Ass Ranch, Arlee, Montana. Defendant Tom Ryan and Ken Waltman repeated this round-trip exchange of vehicles and cigarettes on February 22, 1991, April 3, 1991, April 19, 1991, August 29, 1991, September 23, 1991, and October 23, 1991.

Similarly, on November 1, 1991, Clint Rice, another employee of Dorothy Clinkenbeard, drove a vehicle loaded with cigarettes from the Busted Ass Ranch, Arlee, Montana, to Post Falls, Idaho. There, Defendant Rice met unindicted co-conspirator Ralph Darley, who had driven a vehicle to Post Falls, Idaho, from Darley's employer, The Thunderbird Trading Post, Tacoma, Washington. Idaho. Ralph Darley drove Rice's vehicle loaded with more than 60,000 cigarettes from Post Falls, Idaho, to The Thunderbird Trading Post, Tacoma Washington. Clint Rice drove a vehicle from Post Falls, Idaho to the Busted Ass Ranch, Arlee, Montana. Defendant Clint Rice and Ralph Darley repeated this round-trip exchange of vehicles and more than 60,000 cigarettes on November 15, 1991. On November 5, 1991, both Clint Rice and Tom Ryan drove a vehicle loaded with more than 60,000 cigarettes from the Busted Ass Ranch, Arlee, Montana, to Post Falls, Idaho. Similarly, on November 8, 1991, Tom Ryan drove a vehicle loaded with more than 60,000

cigarettes from the Busted Ass Ranch, Arlee, Montana to Post Falls, Idaho.

On October 29, 1993, Ray Brigman, an indicted co-conspirator and co-owner of Kaw-Li-Ja smoke shop in Ford, Washington, traveled from Ford Washington to the Busted Ass Ranch in Arlee, Montana, where he picked up more than 60,000 cigarettes which bore no evidence of payment of applicable state cigarette taxes as required by the State of Washington. Defendant Ray Brigman then returned to Ford, Washington, with the cigarettes. On November 7, 1991, Defendant Ray Brigman repeated the round-trip, once again returning to Washington with more than 60,000 cigarettes.

On October 31, 1991, John Cook, an indicated co-conspirator who co-owns J&J's Smoke Shop, traveled from J&J's Smoke Shop, Okanogan, Washington, to the Busted Ass Ranch, Arlee, Montana, for the purpose of picking up more than 60,000 cigarettes which bore no evidence of the payment of applicable state cigarette taxes as required by the

State of Washington. John Cook returned to Washington with these cigarettes. John Cook repeated this round-trip pickup of more than 60,000 cigarettes on November 4, 1991, and November 12, 1991.

On November 3, 1991, Terry Tonasket, an alleged co-conspirator indicated in a severed case, who is employed by the Sogie Store in Omak, Washington, traveled from Omak, Washington, to the Busted Ass Ranch, Arlee, Montana, for the purpose of picking up more than 60,000 cigarettes which bore no evidence of the payment of applicable state cigarette taxes as required by the State of Washington. Terry Tonasket returned to Omak, Washington, with these cigarettes. Terry Tonasket repeated this round-trip pickup of more than 60,000 cigarettes on November 15, 1991.

On November 7, 2992, Wayne Boyes, an employee of Dorothy Clinkenbeard, drove a vehicle loaded with cigarettes from the Busted Ass Ranch, Arlee, Montana, to Couer d'Alene, Idaho. There, Defendant Boyes met indicted co-

conspirator Curt Hale, who had driven a vehicle to Couer d'Alene, Idaho, from Tacoma, Washington. Defendant Boyes and Hale exchanged their vehicles in Couer d'Alene, Idaho. Curt Hale drove Boyes' vehicle loaded with more than 60,000 cigarettes from Couer d'Alene, Idaho, to Tacoma, Washington. Wayne Boyes drove a vehicle from Couer d'Alene, Idaho to the Busted Ass Ranch, Arlee, Montana. On November 15, 1991, Defendant Wayne Boyes again drove a vehicle loaded with more than 60,000 cigarettes from the Busted Ass Ranch, Arlee, Montana to Couer d'Alene, Idaho.

The Thunderbird Trading Post, in Tacoma, Washington, which was operated and managed by co-defendant Ted Gord, made its payments for cigarettes to Joe's Smoke Ring, in Evaro, Montana. Payment was made by cashier;s checks and money orders, and were deposited in the Joe's Smoke Ring account at First Security Bank, Missoula, Montana. In 1988, the Thunderbird deposits totaled $532,307.30; in 1989, $2,431,523.70; in 1990, $4,231,737.82;

in 1991, $4,139,897.02.

The Indian Trading Post, in Tacoma, Washington, which was operated and managed by Defendant Ralph Hale, made its payments for cigarettes to Joe's Smoke Ring, in Evaro, Montana. Payments were made by wire transfer and check, and were deposited in the Joe's Smoke Ring account at First Security Bank, Missoula, Montana. In 1988, the Indian Trading Post deposits totaled $29,795.00; in 1989, $232,660.00; in 1990, $715,380.00 in 1991, $3,200,559.99.

The Shoppe, in Puyallup, Washington, which was operated and managed by Defendant Kenneth Baker, made its payments for cigarettes to Joe's Smoke Ring, in Evaro, Montana. Payments were made by cashier's check, and were deposited in the Joe's Smoke Ring account at First Security Bank, Missoula, Montana. In 1988, The Shope deposits totaled $235,372.11; in 1989, $719,303.68; in 1990, $1,164,098.83; in 1991, $1,098,237.59.

At all times materials to the Indictment, Stan Feist,

sole owners of Feist and Watson Enterprises, Inc,. d/b/a Sheehan Majestic, served as cigarette supplier to Joe's Smoke Ring. Feist received business checks drawn upon the Joe's Smoke Ring account at First Security Bank and deposited those payments into an account at First Interstate Bank, Missoula, Montana. The deposits in 1988 totaled $7,459,120.97; in 1989, $12,258,346.44; in 1990, $13,377,964.64; in 1991, $13,319,283.74.

## THE INDICTMENT

On the foregoing facts, the Indictment charges Stan Feist (Counts 1-740), Dorothy Clinkenbeard (Counts 1-2807), Ted Gord (Counts 741-1916), Ralph Hale (Counts 1917-2135), and Kenneth Baker and Shirley Martin (Counts 2136-2135) with money laundering (18 U.S.C. § 1956 (a) (12) (A) (i)) and aiding and abetting (18 U.S.C. § 2). Count 2808 charges Stan Feist, Larry Clinkenbeard, Dorothy Clinkenbeard, Deb Boyes, Tom

Ryan, Jason Clinkenbeard, Lee Clinkenbeard, Joanne Cooke, John Cooke with conspiring to traffic in contraband cigarettes in violation of 18 U.S.C. § 371. Counts 2809-2811 charge John Cook, Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C. § 2342 (a) and aiding and abetting the same in violation of 18 U.S.C. § 2.

Count 2812 charges Stan Feist, Larry Clinkenbeard, Dorothy Clinkenbeard, Deb Boyes, Tom Ryan, Jason Clinkenbeard, Lee Clinkenbeard, Ray Brigman, Jr., Curt Brigman, and Clifford Brigman wit conspiring to traffic in contraband cigarettes in violation of 18 U.S.C § 371. Counts 2813-2814 charge Ray Brigman, Jr., Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C. § 2342(a) and aiding and abetting the same in violation of 18 U.S.C. § 2.

Count 2815 charges Stan Feist, Larry Clinkenbeard,

Dorothy Clinkenbeard, Deb Boyes, Tom Ryan, Jason Clinkenbeard, Lee Clinkenbeard, Leonard Tonasket, and Terry Tonasket with conspiring to traffic in contraband cigarettes in violation of 18 U.S.C. 371. Counts 2816-2817 charge Terry Tonasket, Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C. § 2342(a) and aiding and abetting in the same in violation of 18 U.S.C. § 2.

Count 2818 charges Stan Fiest, Larry Clinkenbeard, Dorothy Clinkenbeard, Deb Boyes, Tom Ryan, Jason Clinkenbeard, Lee Clinkenbeard, Clint Rice, Wayne Boyes, Ralph Darley, Deborah Thompson, and Ted Gord with conspiring to traffic in contraband cigarettes in violation of 18 U.S.C § 371. Counts 2819-2823 charge Ted Gord, Clint Rice, Tom Ryan, Ralph Darley, Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C.

§ 2342(a) and aiding and abetting in the same in violation of 18 U.S.C. § 2.

Count 2824 charges Stan Feist, Larry Clinkenbeard, Dorothy Clinkenbeard, Deb Boyes, Tom Ryan, Wayne Boyes, Jason Clinkenbeard, Lee Clinkenbeard, Curt Hale,Ralph Hale, Bill Flores, and unindicted co-conspirator Andy McCloud with conspiring to traffic in contraband cigarettes in violation of 18 U.S.C. § 371. Counts 2825-2826 charge Ralph Hale,Wayne Boyes, Curt Hale, Stan Fiest, Dorothy Clinkenbeard,Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C. § 2342(a) and aiding and abetting the same in violation of 18 U.S.C. § 2.

Count 2827 charges Stan Feist, Larry Clinkenbeard, Dorothy Clinkenbeard, Deb Boyes, Tom Ryan, Jason Clinkenbeard, Lee Clinkenbeard, Kenneth Baker, Shirley Martin, Clint Rice, and unindicted co-conspirators Barbara Reblin, Marvin Dolack, Butch Pierce, and Ken Waltman with

conspiring to traffic in contraband cigarettes in violation of 18 U.S.C. §371. Counts 2828-2834 charge Kenneth Baker, Shirley Martin, Tom Ryan, Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, and Deb Boyes with trafficking in contraband cigarettes in violation of 18 U.S.C. §2342(a) and aiding and abetting in the same in violation of 18 U.S.C. § 2.

Count 2835 charges that the following individuals and entities together constitute an enterprise as defined in 18 U.S.C. § 1961(4): Sheehan Majestic, Stan Feist, Joe's Smoke Ring, Larry Clinkenbeard, Dorothy Clinkenbeard, Northwest Display, Inc., Deborah Boyes, Wayne Boyes, Clint Rice, Tom Ryan, Lee Clinkenbeard, Jason Clinkenbeard, Joanne Cook, John Cook, Ray Brigman, Jr., Curt Brigman, Leonard Tonasket, Terry Tonasket, Ted Gord, Ralph Hale, Curt Hale, Kenneth Baker, Shirley Martin, Bill Flores, Ralph Darley, and Debbie Thompson.

Count 2835 also charges that Stan Feist, Larry

Clinkenbeard, Dorothy Clinkenbeard, Ted Gord, Ralph Hale,and Kenneth Baker conducted the affairs of the enterprise through a pattern of racketeering activity. The pattern of racketeering is based upon sixteen overt acts of money laundering and six acts of trafficking in contraband cigarettes.

Count 2836 realleges the allegations of Count 2835 to charge a racketeering conspiracy in violation of 18 U.S.C. § 1962(c). Count 2836 also alleges 73 overt acts committed in furtherance of the conspiracy.

## II. STATE OF WASHINGTON REGULATORY SYSTEM.

At the time of the events giving rise to the Indictment in this case, the State of Washington imposed a cigarette tax at the rate of 34 cents per pack of cigarettes or $3.40 per carton. Payment of the tax is to be evidenced by affixing cigarette stamps to each package of cigarettes. Wash. Rev. Code § 82.24.030. Wholesaler and retailers are obligated to

affix such stamps in the manner provided by statute. See Wash. Rev. Code §§ 82.24.130.

An exception to the obligation to affix tax stamps on cigarettes does exist, however. This exception has two underlying requirements. To avoid treatment of cigarettes as contraband, a wholesaler or distributor must notify the Washington Department of Revenue before transporting unstamped cigarettes to a tribal vendor. While in transit, the transporter must possess invoices identifying the wholesaler, and retailer, and the quantity and brands of cigarettes in transit. This program of off-reservation administration of the cigarette excise tax is set forth in Wash. Adm. Code § 458-20-192 (Rule 192)[27] which states that:

> Delivery or sale and delivery by any persons of unstamped cigarettes to Indians or tribal vendors for sale to qualified purchasers may be made only in such quantity as is

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[27] The government notes that Defendant Kenneth Baker has in the past litigated the legality of the State of Washington's ..... (holding that seizure and forfeiture of cigarettes and transport vehicle under Washington's program of off-reservation enforcement was proper).

approved in advance by the department of revenue. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the vendor. Evidence submitted may also consist of verified records of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the vendor's place of business, records indicating the percentage of such trade that has historically been realized by the vendor, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of unstamped cigarettes to any reservation or to any Indian or tribal vendor thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year by the Tobacco Tax Institute, multiplied by the resident enrolled membership of the affected tribe. Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal vendor without advance approval by the department will result in the treatment of those cigarettes as contraband and subject to seizure and in addition the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. Approval for sale or delivery to Indian or tribal vendors of

> unstamped cigarettes will be denied where the department finds that such Indian or tribal vendors are or have been making sales in violation of this rule.
>
> Delivery of unstamped cigarettes by and licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.
>
> Revised November 14, 1980.

The primary purpose of the State of Washington cigarette tax regulations is to ensure that untaxed cigarettes are delivered to Indian reservations in sufficient quantities for tribal member consumption. To that end, the State of Washington permits licensed distributors to deliver quantities of unstamped cigarettes to retailers on reservations in an amount equivalent to the national per capita consumption (which is higher than the per capita consumption for the State of Washington). Thus, the reservations within the State of Washington are allotted a quota of unstamped cigarettes for every enrolled member of the tribe--man, woman, and child,

whether or not the enrolled member actually consumes cigarettes.

In order to administer the program effectively, the State of Washington requires that licensed distributors must obtain state approval on a day-to-day basis before delivering unstamped cigarettes to the reservation. For purposes of this regulatory system, the race of the wholesaler/distributor is entirely irrelevant, and application of these regulations is nondiscriminatory. All deliveries of unstamped cigarettes must be made by licensed distributors vehicles or bonded carrier; off-reservation deliveries are prohibited. In this way, the State of Washington prohibits Indian retailers from obtaining unstamped cigarettes off-reservation and transporting the cigarettes back onto the reservation. Significantly, the regulation warns that any delivery of unstamped cigarettes to an Indian vendor without advance approval of the State of Washington's Department of Revenue will result in the cigarettes being treated as contraband.

Essentially, a reservation tobacco vendor,whether wholesaler r retailer,loses the exemption allowing possession of unstamped cigarettes when the vendor fails to abide by Washington's regulations.

## III. THE FEDERAL STATUTORY SYSTEM: THE CONTRABAND CIGARETTE TRAFFICKING ACT (CCTA).

The Contraband Cigarette Trafficking Act (CCTA) was passed by Congress in 1978 to permit the federal government to help the states enforce their cigarette tax laws. The CCTA was premised upon the belief that the states were unable to investigate and thwart inter-state cigarette smuggling operations and that the states needed the law enforcement assistance of the federal government to enforce their cigarette tax laws. Thus, the CCTA is a hybrid statute requiring the federal government to enforce state cigarette tax laws.

The CCTA is found at 18 U.S.C. §2341-2346. Section 2341(2) of the Act provides, in pertinent part:

> The term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable state cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes.

The court expressly finds that a precollection of an excise tax, whether the precollection is performed by a distributor, and wholesaler,or a retailer, is an "applicable state cigarette tax" for purposes of the CCTA. Section 2342(a) of the Act provides:

> It shall be unlawful for any person knowingly[28] to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

The most critical issue is the definition of contraband

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[28] "The statute does not require the government to prove that the defendant knew that payment of state cigarette taxes was required, or knew that taxes had not been paid." United States v. Elshenawy, 801 F.2d 856 (6th Cir. 1986). "The definition of 'contraband cigarettes' ... does not depend upon the actor's state of mind or degree of knowledge. Rather, the definition of 'contraband cigarettes' depends only upon the absence of indicia of state tax payment and location in a state requiring such indicia." Id.

cigarettes under § 2341(2): Can unstamped cigarettes be considered contraband before they are found in the State of Washington? I think not.[29]

The plain meaning of the phrase "which bears no evidence of the payment of applicable state cigarette taxes in the State where such cigarettes are found" is that when the cigarettes are found in the State of Washington they do not bear evidence of payment of the applicable Washington cigarette tax. The facts alleged in the Indictment, however, fail to allege that a Montana defendant ever crossed the

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[29] But see United States v. Legrano, 659 F.2d 17 (4th Cir. 1981). The United States District Court for the Eastern District of Virginia accepted Defendant's guilty plea to two counts of trafficking in contraband cigarettes. Id. at 18. At sentencing, his sentencing level was determined based on the fact that his "bootlegging activities had deprived the State of New York of approximately $2.4 million in cigarette tax revenues." Id. See also United States v. Boggs, 775 F.2d 582 (4th Cir. 1985) (holding defendant could be convicted of trafficking in contraband cigarettes after being arrested in West Virginia, while transporting cigarettes from North Carolina to Michigan, even through Defendant did not intend to sell the cigarettes in West Virginia). In Boggs, however, the violation of CCTA rested upon defendant's not having "in his possession papers showing the name and address of the person who had paid the Michigan tax or had assumed its payment" as required by West Virginia law, and in the absence of such papers a West Virginia tax was applicable. Id. at 585.

Washington border with cigarettes. Apparently,the Montana defendants are alleged to have transferred the cigarettes to the Washington defendants outside of Washington's borders. I find, therefore, that the Montana defendants could not have committed the substantive crime of contraband cigarette trafficking in the State of Montana.[30] The crimes that the Montana defendants may have committed, and for which they may be tried, are the related crimes of money laundering, conspiracy, aiding and abetting, and participating in a criminal enterprise.

The legislative history to the CCTA shows that the primary cause of cigarette bootlegging between states was thought to be the variations between the various states' tax rates which developed after the mid-1960s.[31] At the time

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[30] As an aside, the Montana defendants who switched vehicles containing unstamped cigarettes in the state of Idaho might have violated the CCTA if the cigarettes so transferred were lacking in an applicable Idaho tax stamp. The Indictment does not allege this fact, however.

[31] Hearing Before the Subcomm. on Criminal Laws and Procedures of the Somm. on the Judiciary. 95th Cong., 1st Sess. 9-10 (1977) (testimony of Wayne F. Anderson, Exec. Dir., Advisory Commission on

of passage of the CCTA, the State of Washington was considered to be among the seventeen states with the most serious revenue losses due to cigarette smuggling.[32] In describing the problem, the Advisory Commission in Intergovernmental Relations stated that

> [c]igarette bootlegging has dealt a damaging blow to the legitimate tobacco industry. Many jobs have been lost at the wholesale and retail level. In addition, some dealers have been forced into illegal activities in order to compete with bootleggers.[33]

The same Commission specifically considered sales of tax-free cigarettes on reservations:

> Five western States consider the purchase of tax-free cigarettes on reservations by non-Indians as a major tax evasion problem. The problem appears to be particularly severe in Washington State. The Washington Department of Revenue estimated the revenue loss at $0.7 million in 1969 and at

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Intergovernmental Relations).

[32] Advisory Commission in Intergovernmental Relations, Cigarette Bootlegging: A State AND Federal Responsibility 1-3 (1977).

[33] Id. at 4.

> over $10 million in 1975. A case was cited of one Indian smoke shop owner who sold 932,283 cartons of cigarettes in a 1-year period, realizing a gross income of over $1,000,000. The State of Washington's loss on these cigarettes was $1,687,000.
>
> ...
>
> As it is unlikely that State taxing owners will be extended to the Indian reservations, the solution to this cigarette tax evasion problem appears to be a cooperative effort between the Indians and the State...[34]

As legislative history to the CCTA shows, the CCTA was passed with the Congressional understanding that it would not interfere with any then-existing tribal exemptions from state taxes.

In general, however, federal laws applicable throughout the United States also apply to Indians. United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) (applying Organized Crime Control At of 1970 to Puyallup Indians). See also United States Department of Labor v. Occupational Safety and Health Review Commission, 935 F.2d 182 (9th

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[34] Id. at 36-37

Cir. 1991) (applying Occupational Health and Safety Act to tribal sawmill on reservation). Three exceptions are (1) laws touching "exclusive rights of self-governance in purely intramural matters," (2) laws abrogating specific rights guaranteed by Indian treaties, and (3) laws for which proof exists that Congress did not intend the law to apply to Indians on their reservations. Id at 893-94.

The third exception, whether there is proof that Congress intended the CCTA not to apply to Indians on their reservations, is at issue. It was generally understood at the time of passage that Indians were exempt from state cigarette tax laws.[35] The legislative history shows, however, that Congress merely intended not to interfere with any existing exemption:

> Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in

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[35] See supra text accompanying note 8.

> the commercial sale of cigarettes within Indian country free of state taxation. The phrase 'applicable state cigarette taxes' makes it clear that transportation or sale by Indians or Indian tribes acting in accordance with legally established rights. The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe.[36]

While this legislative history evidences a desire to avoid extinguishing legally established rights, the method chosen to accomplish this was the phrase 'applicable state cigarette taxes,' which is apparently intended to accommodate changes in the applicable tax laws. Thus, proof does not exist that Congress intended that the CCTA not apply to Indians on their reservations. Rather, the legislative history shows that Congress intended to avoid interfering with those Indian activities not in violation of state law by virtue of an exemption. In this case, as the parties are fully aware, we

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[36] H.R. Conf. Rep. No. 1778, 95th Cong. 2d Sess. 1, 9 n.17, reprinted in 1978 U.S. Code Cong. & Admin. News at 5538 (emphasis added).

are discussing Indian and non-Indian activities that explicitly violate state law and for which no exemption has existed for well over a decade.

## IV. INDIAN CIGARETTE TAX LAW AFTER COLVILLE.

Shortly after the passage of the CCTA, the United States Supreme Court held that the State of Washington may tax sales by Indian reservation vendors to nonmembers. State of Washington v. Confederated Tribes f the Colville Indian Reservation, 447 U.S. 134, 159, 65 L.Ed.2d 10, 100 S. Ct. 2069 (1980) [hereinafter Colville]. The Court in Colville stated further that if the tribes did not cooperate with the State of Washington, the state could also seize as contraband any unstamped cigarettes traveling to a Washington reservation from out-of-state dealers who are also federally licensed Indian traders:

> We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in

> transit are as yet exempt from state taxation,[37] they are not immune from seizure when the Tribes, as here,have refused to fulfill collection and remittance obligations which the State has validly imposed.

Id. at 161-162. See also id. at 144 & n.18.

In Colville, the Court reached for the first time the question of whether a state could apply its cigarette taxes to an Indian purchasing cigarettes on a reservation where he or she is not an enrolled member. Colville, 447 U.S. at 160. The court emphatically ruled in the affirmative. Id. "For most practical purposes those [nonmember] Indians stand on the same footing as non-Indians resident on the reservation....We find, therefore, that the State's interest in

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[37] The State of Washington regulatory scheme in Colville differs significantly from the regulatory scheme we discuss today. In Colville, the then-current regulatory scheme was to allow all cigarettes to enter the reservation without payment of state cigarette taxes. The retailer then was to record transactions with nonmember purchasers, collect the tax from the purchaser, and remit the tax to the state.

Today, cigarettes intended for on-reservation purchase by nonmembers must be stamped. Sales to members require no collection of tax, but the advance notice to the state and invoice requirements apply to those sales. Without advance notice, and State of Washington deems unstamped cigarettes entering a reservation to be intended for purchase by nonmembers.

taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes." Id.

After Colville, the legally significant fact for taxation of cigarette sales on reservations is not whether the purchaser is an Indian, but whether the purchaser is an enrolled member of the tribe wherein the tobacco vendor is doing its business. For example,consider the case of an Indian tobacco vendor in all respects similar to Defendant Dorothy Clinkenbeard. Such a tobacco vendor would be able to sell untaxed cigarettes to the enrolled members of her tribe, but the tobacco vendor also would have to follow all applicable cigarette tax laws for sales to nonmembers. When retailing to State of Montana nonmembers, for example, the tobacco vendor would be subject to Montana tax law. When wholesaling into the State of Washington, the tobacco vendor would be subject to Washington tax law. The only possible exemption to which the tobacco vendor's customers might be entitled would be the exemption possessed by an enrolled

tribal member. Even then, however, the tobacco vendor would be obligated to apply any tribal tax law,if an applicable tax existed. Indians, whether sellers or purchasers, therefore have no general, all-purpose exemption from cigarette taxes.

In Colville, four Indian tribes brought an action for declaratory and injunctive relief against the State of Washington. The tribes sought relief from application of Washington's cigarette excise tax to on-reservation sales and from Washington's seizure of untaxed cigarettes as contraband. Id. at 139. Each tribe had a tobacco outlet or outlets and each tribe imposed its own cigarette tax (40 to 50 cents per carton) on the cigarettes sold at these outlets. Id. at 144. The tribes purchased cigarettes for these tobacco outlets from out-of-state federally licensed Indian traders, without payment of applicable state cigarette taxes. Id. These tribal tobacco outlets were popular among many non-Indians, who traveled to the reservation expressly to avoid

paying the state cigarette tax of $1.60 per carton. Id. at 145.

The United States Supreme Court in Colville held that the State of Washington was entitled to impose and enforce state cigarette taxes on reservation sales of cigarettes to non-Indians and non-enrolled members of tribes. Id. at 160-61. The Court therefore reversed the three-judge district court's grant of declaratory and injunctive relief to the four tribes.

The Court reasoned that the regulatory scheme in Colville was similar to that upheld in Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 48 L.Ed.2d 96, 96 S. Ct. 1634 (1976). In Moe, the State of Montana had sought to require tribal tobacco outlets to collect a state tax on cigarettes sold both to Indians and non-Indians.[38] As to the

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[38] Moe, 425 U.S. at 467-68. Moe began in United States District Court for the District of Montana as a complaint filed by a reservation vendor who was arrested in 1972 by state law enforcement for selling cigarettes without a state license and for not having a state cigarette tax stamp affixed to cigarettes sold. Defendant Dorothy Clinkenbeard was a party to the Moe case. Montana did not actually begin collecting state taxes for on-reservation cigarette sales until 1993. Thus, although the Moe decision predates the passage of the CCTA, the popular consensus nation-wide appears to have been that Indians were exempt from state cigarette taxes,because as a practical matter they generally did not pay

non-Indian purchasers, the Court considered the collection requirement to be a "minimal burden," and the Court found it acceptable for Montana to impose that burden on an Indian tobacco outlet. Moe, 425 U.S. at 483, 48 L.Ed.2d 96, 96 S. Ct. 1634. Similarly, the Court in Colville found that Washington's regulatory scheme was a minimal burden. Id. at 159.

Today, and at all times material to this Indictment, the Washington regulatory scheme is even less burdensome on Indian tobacco vendors than it was in 1980. Washington's entire regulatory program and its administration is now accomplished off-reservation. When selling cigarettes to a reservation retailer that are intended for non-tribal members, a licensed distributor pays the state tax directly to the state. When selling cigarettes to a reservation retailer that are intended for tribal members,a licensed distributor obtains approval from the state to deliver unstamped cigarettes to the

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cigarette taxes.

reservation. This regulatory scheme clearly places only minimal burdens upon reservation tobacco vendors.

## V. FEDERAL PREEMPTION OF STATE CIGARETTE TAX LAWS.

Defendant Dorothy Clinkenbeard asserts that the Federal Indian Trader Act, 25 U.S.C. §§ 261, et seq., preempts state cigarette tax laws.

In Colville, the cigarettes entering Washington reservations came from an out-of-state federally licensed Indian trader. At that time, the regulatory system required that the retailer pay the tax to the state. Yet the Court held that it would be permissible for the State of Washington to seize cigarettes coming from these out-of-state federally licensed Indian traders as contraband when reservation retailers had shown themselves to be unwilling to remit to the state the applicable cigarette tax. In other words, it would be permissible for a state to interdict shipments of unstamped cigarettes flowing from out-of-state federally

licensed Indian traders to reservation retailers not in compliance with state tax law.

Recently, the State of Washington revised its regulatory system to require the wholesaler/distributor to remit the applicable cigarette tax to the state, instead of the reservation retailer. Washington specifically warned in Regulation 192 that shipments of unstamped cigarettes coming from out-of-state wholesalers without advance approval of Washington's Department of Revenue would be treated as contraband.

Can an out-of-state wholesaler/distributor in the position of Defendant Dorothy Clinkenbeard circumvent the State of Washington taxing system by virtue of her location in Montana or her status as a federally licensed Indian trader? I think not. Otherwise, the Washington cigarette tax system as it relates to the reservations would collapse because no Indian retailer would ever purchase cigarettes from a wholesaler or distributor who insisted upon paying the

applicable taxes to the State of Washington, when the Indian retailer could just as easily purchase cigarettes from wholesalers who did not choose to pay the tax.

The United States Supreme Court recently reaffirmed its support of state enforcement of cigarette taxes on wholesalers. In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,[39] the Court explained that states may collect taxes on cigarettes from wholesalers when Indian retailers fail to pay the applicable cigarette taxes,either by seizing unstamped cigarettes off the reservation or by assessing wholesalers with the tax. Potawatomi at 514, 112 L.Ed. 2d at 1123, 111 S. Ct. 905. Potawatomi is factually similar to Colville in that both cases involved reservation retailers who essentially refused to collect state taxes when selling cigarettes to non-tribal members, and in both cases the United States Supreme Court

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[39] 498 U.S. 505, 112 L.Ed.2d 1112, 111 S. Ct. 905 [hereinafter Potawatomi]

affirmed the state's right to enforce cigarette taxes against wholesalers.

Defendants refer this court to a recent New York Court of Appeals' that the Indian Trader Act has preempted the New York cigarette tax system as applied to a federally licensed Indian trader.[40] That decision is not binding on this court, however. Neither am I satisfied that the case was correctly decided.

In Milhelm Attea & Bros., plaintiffs, federally licensed Indian trader wholesalers, brought an action for declaratory and injunctive relief against the State of New York, contending that the Indian traders statutes preempted the new New York cigarette tax regulations. The trial court held the regulations to be preempted, and the Appellate

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[40] Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance of State of New York, 580 N.E.2d 1057 (N.Y. 1991), cert. granted and remanded 112 S. Ct. 926, 117 L.Ed.2d 99, 60 USLW 3447 (1992), and Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., _____ S. Ct. _____, 1993 WL 376076, 62 USLW 3188 (U.S.N.Y. November 1, 1993) (NO. 93-377) [hereinafter Milhelm Attea & Bros.]

Division affirmed.[41] The Court of Appeals of New York dismissed the state's appeal.[42] Upon the State of New York's petition for certiorari, the united States Supreme Court vacated the judgment and remanded the case back to the Appellate Division "for further consideration in light of" Potawatomi.[43] Upon remand the Appellate Division reversed itself, holding that the regulations imposed "minimal burdens" that were not preempted by federal law.[44] The wholesalers then appealed, and the Court of Appeals of New York reversed the Appellate Division, holding the regulations to be preempted by the Indian traders statutes.[45] The State of New York once again petitioned for certiorari, and the

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[41] Milhelm Attea & Bros.,Inc. v. Department of Taxation and Finance of State of N.Y., 564 N.Y.S.2d 491 (N.Y.A.D. 3 Dept., 1990).

[42] Attea & Bros., Inc. v. Department of Taxation and Finance of State of New York, 580 N.E.2d 1507 (N.Y. 1991).

[43] Milhelm Attea & Bros., ___ U.S. ___, 117 L.Ed.2d 99, 112 S.Ct. 926 (1992).

[44] Milhelm Attea & Bros., 585 N.Y.S.2d 847 (1992).

[45] Milhelm Attea & Bros., 615 N.E.2d 944 (N.Y. 1993).

United States Supreme Court has recently granted the petition.[46]

The New York regulatory system at issue in Milhelm Attea & Bros. is similar to Washington's current regulatory system. Both states have devised a regulatory system whereby wholesalers and distributors must pay applicable cigarette taxes to the state in all instances unless (1) the cigarettes are intended for sale to tribal members on reservations and (2) the state's advance approval and quota requirements are met. The New York Court of Appeals found that this system imposed a significant burden on the wholesaler. The court identified those burdens as the limitation on the permissible number of unstamped cigarettes that a wholesaler may sell to Indian retailers, the requirement that only registered vendors may deal in unstamped cigarettes, and the requirement that wholesalers prepay (and

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[46] Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., ___ S. Ct. ____, 1993 WL 376076, 62 USLW 3188 (U.S.N.Y., November 1, 1993) (No. 93-377).

retailers pay after the fact) taxes on sales exceeding the allowed quota.

On remand, the New York Court of Appeals relied on Warren Trading post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965), for the proposition that "Congress had taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens on them." Milhelm & Attea Bros., 599 N.Y.S.2d 510, 514 (1993). But see Rice v. Rehner, 463 U.S. 713, 77 L.Ed.2d 961, 103 S.Ct. 3291 (1983) (upholding California's requirement that federally licensed Indian trader on reservation obtain state liquor license). In Warren Trading Post Co., however, Arizona attempted to tax the gross receipts of a federally licensed Indian trader on sales of goods to Indians on the Navajo Indian Reservation. The Court found this tax to be an excessive burden by the state on the trader.

In the instant case, the state would be seeking to

impose on a trader a pass-through cigarette tax that would be ultimately borne by non-Indian and nonmember purchasers. Unlike the facts underlying Warren Trading Post, the Washington tax is not an income tax on receipts from goods sold to Indians, but rather an excise tax on tobacco sold to non-Indians and nonmembers.

I conclude that the basic purpose of the Indian trader statutes is to protect Indian customers on the reservation from exploitation. See Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980). To the extent that state taxes burden retail trade they are preempted. However, the Indian trader statutes do not similarly oust all state regulation of retail trade with non-Indians on an Indian reservation. "The Indian traders statutes, 25 U.S.C. § 261 et seq., incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, see Warren Trading Post Co. v. Arizona Tax Comm'n (citation omitted), but no similar intent is

evidenced with respect to sales by Indians to nonmembers of the Tribe." Colville, 447 U.S. at 155-56. Thus, under Colville and Potawatomi, even an Indian trader who is himself or herself an Indian may be required to collect state taxes in connection with his or her retail trade with non-Indians. Hence, the Indian trader statutes do not preempt all state laws that touch upon transactions in which the goods at issue are to be sold to non-Indians.

In addition, the taxes that the state seeks to impose on the wholesalers, both in Milhelm Attea & Bros. and in the instant case,are already paid regularly by those wholesalers in their other transactions. Can a cigarette wholesaler and distributor reasonably claim that payment of applicable cigarette taxes unduly burdens his or her business when payment of state cigarette excise taxes is and has been for decades an everyday requirement in the wholesale tobacco business?

Further, the United States Supreme Court in Colville

explicitly held that "the State may validly require the tribal smokeshops to affix tax stamps purchased from the state...prior to the time of sale to non-members of the Tribe." Colville, 447 U.S. at 159 (emphasis added). The Court thus made clear that states may require Indian retailers to prepay the cigarette tax directly to the State by requiring them to purchase tax stamps from the State prior to the sale of the cigarettes. The result should not be different where the state requires the retailer to prepay the tax not to the State, but to the wholesaler, which has already prepaid the tax to the state.

## VI. CONCLUSION.

The State of Washington has apparently tried to enforce its cigarette tax laws while refraining from intruding unduly upon the core of tribal sovereignty. However, even with a regulatory system apparently reasonably designed at least in part to stop contraband cigarette trafficking, the loss of tax revenues has continued. I find as a matter of law that

this regulatory system imposes a minimal burden on Indian tobacco vendors. Finally, some of the acts alleged in the Indictment apparently fall within the type of criminal conduct that Congress intended the CCTA to prohibit. Other acts alleged in the Indictment apparently constitute other types of criminal conduct.

In another matter, the court in May notified the government that it would be required to have two trial counsel present during trial of the case. The notice was given at that time to give the government time to arrange such representation either with the Department of Justice or the Eastern or Western Districts of Washington United States Attorney. Now in the month of trial, the government has moved the court to withdraw this order on several grounds. This motion is not well taken.

The sheer magnitude of this case cries out for additional trial counsel in the second chair. We are talking about thousands of counts, twelve separate defendants

defending with 12 independent attorneys, and many issues of first impression in the courts. This is a major case. It would be an imposition upon the defendants, the twelve attorneys representing them at trial, the jury, and the court, and it might add days to the trial, to permit this case to be tried by one lawyer. This is not a criticism of Kris McLean, who is known as a capable, experienced, and competent prosecutor. It is simply more thana one-person job, and the court must require the government to provide the additional trial lawyer.

In yet another matter,it has been brought to the court's attention that the deadline for filing plea agreements in this matter expired on September 15, 1993. Because the defendants are only now in a position to know the court's ruling on the key legal issues addressed herein, the plea deadline should be and will be extended.

Accordingly,

IT IS HEREBY ORDERED that the violations of 18 U.S.C. § 2342(a) charged in the following counts are

DISMISSED as to the following Defendants:

| | | |
|---|---|---|
| 1. | Counts 2809-2811: | Stan Feist, Dorothy Clinkenbeard, Larry Clinkenbeard, Deborah Boyes; |
| 2. | Counts 2813-2814: | see #1; |
| 3. | Counts 2816-2817: | see #1; |
| 4. | Count 2819: | see #1, Clint Rice; |
| 5. | Count 2820: | see #1, Clint Rice, Tom Ryan; |
| 6. | Count 2821: | see #1, Tom Ryan; |
| 7. | Counts 2822-2823: | see #1, Clint Rice; |
| 8. | Counts 2825-2826: | see #1, Wayne Boyes; and |
| 9. | Counts 2828-2834: | see #1, Tom Ryan. |

This dismissal shall not affect any violation of 18 U.S.C. § 2342(a) charged in the foregoing counts against any other defendant, nor shall it affect any other violation charged against any of the defendants.

IT IS FURTHER ORDERED that the following Motions to Join in the motions to dismiss are GRANTED:

1. Clint Rice (Docket Number 377);
2. Lee Clinkenbeard (Docket Number 353);
3. Jason Clinkenbeard (Docket Number 356);
4. Kenneth Baker (Docket Number 310);
5. Tom Ryan (Docket Numbers 295, 359);
6. Deborah Boyes (Docket Numbers 307, 425 as

to Motions to Dismiss only); and

7. Wayne Boyes (Docket Numbers 307, 425 as to Motions to Dismiss only).

IT IS FURTHER ORDERED that the following motions to dismiss are DENIED:

1. Stan Feist (Docket Numbers 302, 362, 364);
2. Larry Clinkenbeard (Docket Numbers 279, 404);
3. Dorothy Clinkenbeard (Docket Numbers 296, 326);
4. Clint Rice (Docket Numbers 293, 377);
5. Lee Clinkenbeard (Docket Number 297);
6. Jason Clinkenbeard (Docket Number 297);
7. Ralph Hale (Docket Number 413 as to Motion to Dismiss only);
8. Clifford Brigman (Docket Numbers 299, 346);
9. Kenneth Baker (Docket Number 413 as to Motion to Dismiss only);
10. Deborah Boyes (Docket Number 326); and
11. Wayne Boyes (Docket Number 326).

## APPENDIX E

§ 2341. Definitions

As used in this chapter [18 USCS §§ 2341 et seq.]-

(1) the term "cigarette" means-

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, r purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than-

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1954 [26 USCS §§5701 et seq.] as a manufacturer of tobacco products or as an export warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of

lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person-

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term "common or contract carrier" means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49 [49 USCS §§ 10101 et seq.], or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

and

(5) the term "Secretary" means the Secretary of the Treasury.

(Added Nov. 2, 1978, P.L. 95-575, § 1, 92 Stat. 2463; Jan. 12, 1983, P.L. 97-449, § 5(c), 96 Stat. 2442.)

§ 2342 Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter [19 USCS §§ 2341 et seq.] to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.
(Added Nov. 2, 1978, P.L. 95-575, § 1, 92 Stat. 2464.)